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Presumptively Awful: How the Federal Government Is Failing To Protect the Constitutional Rights of Those Adjudicated as Mentally Ill, as Illustrated by the § 922(g)(4) Circuit Split

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Presumptively Awful: How the Federal Government Is Failing To Protect the Constitutional Rights of Those Adjudicated as Mentally Ill, as Illustrated by the § 922(g)(4) Circuit Split

Abstract

The Third, Sixth, and Ninth Circuits are split as to whether the 18 U.S.C. § 922(g)(4) federal firearms ban violates the Second Amendment rights of those who were once adjudicated as mentally ill but have since returned to good mental health. In Beers v. Attorney General*, the Third Circuit applied its own unique framework and held that § 922(g)(4) is constitutional. Meanwhile, the Sixth Circuit applied intermediate scrutiny in* Tyler v. Hillsdale County Sheriff's Department *and deemed the statute unconstitutional, while in* Mai v. United States*, the Ninth Circuit also applied intermediate scrutiny but held that § 922(g)(4) is constitutional. This Comment explores each circuit's approach to adjudicating these Second Amendment claims, as well as the broader constitutional issues that § 922(g)(4) and its accompanying statutes for relief implicate. Specifically, this Comment asserts that these statutes violate the equal protection and due process rights of many of those adjudicated as mentally ill because federal law provides that citizens in only thirty states may petition for relief from § 922(g)(4). Ultimately, this Comment proposes an amended statute for relief to preserve the constitutional rights of those adjudicated as mentally ill while still maintaining a high standard for relief to protect public safety. Alternatively, this Comment asserts that*

courts assessing Second Amendment challenges to § 922(g)(4) should adopt the Ninth Circuit's approach of deferring to Congress's intent to reduce gun violence while emphasizing that mental illness is not necessarily permanent and should not be stigmatized. Finally, this Comment analyzes the potential efficacy of asserting equal protection and due process claims challenging the constitutionality of § 922(g)(4) and federal relief statutes.

TABLE OF CONTENTS

I. INTRODUCTION

The relationship between mental illness and individual rights has been lengthy, tumultuous, and currently can be characterized as strained, at best.[1] A recent circuit split between the Third, Sixth, and Ninth Circuits as to the constitutionality of the federal firearms ban illustrates just how messy this relationship can be.[2] Indeed, the federal firearms ban, or 18 U.S.C. § 922(g)(4), and its accompanying statutes for relief, jeopardize the due process, equal protection, and Second Amendment rights of those who were once involuntarily committed but have since returned to good mental health.[3] Section 922(g)(4) operates as a lifetime firearm prohibition for those previously adjudicated as mentally ill, and circuit courts are taking divergent approaches to Second Amendment claims challenging this statute.[4] Moreover, the statutory scheme for relief from § 922(g)(4)'s restrictions only provides individuals residing in thirty states with the opportunity to petition for relief, posing due process and equal protection issues.[5]

This Comment seeks to explore the intricacies of the involuntary commitment system, Second Amendment jurisprudence, and § 922(g)(4).[6] Analyzing judicial precedent, the aforementioned circuit split, and the issues posed by the conflicting interests at play, this Comment highlights the need for the federal firearms ban to maintain a high standard for relief while ensuring the constitutional rights of all Americans are adequately preserved with appropriate consideration of their mental health status.[7]

Part II will explore involuntary commitment's standards and history, as well as the evolution of American gun control as it relates to mental illness.[8] Part III will establish where Second Amendment jurisprudence stands as it relates to mental illness, how it has evolved, and how the circuit courts are

1. *See infra* Part II. *See generally* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975); Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1082 (2004).

2. *See* Beers v. Att'y Gen., 927 F.3d 150, 158 (3d Cir. 2019), *cert. granted, judgment vacated*, 140 S. Ct. 2758 (2020); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 685 (6th Cir. 2016); Mai v. United States, 952 F.3d 1106, 1121 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2566 (2021); *see also infra* Part III.

3. *See* 18 U.S.C. § 922(g)(4); *infra* Part IV.

4. *See* § 922(g)(4); *Beers*, 927 F.3d at 158; *Tyler*, 837 F.3d at 685; *Mai*, 952 F.3d at 1121.

5. *See* 34 U.S.C. § 40915; *State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2020*, BUREAU JUST. STATS., https://www.bjs.gov/index.cfm?ty=tp&tid=491#funding (last visited Feb. 6, 2022).

6. *See infra* Parts II, III.

7. *See infra* Parts II, III, IV.

8. *See infra* Part II.

split on § 922(g)(4) cases.[9] Part IV delves into the relationship between mental health, gun control, and public safety.[10] Additionally, this Part proposes solutions to protect public safety and individual rights while avoiding furthering the stigma surrounding mental illness.[11] The proposed solutions advocate for legislative reform, suggest the superior approach for assessing Second Amendment challenges to the federal firearms ban, and discuss the possible efficacy of asserting equal protection and due process claims.[12] Finally, Part V discusses the potential implications of failure to protect the rights of those who have been adjudicated as mentally ill and concludes by summarizing this Comment's proposed solutions.[13]

II. AMERICA'S HISTORY WITH MENTAL ILLNESS AND GUN CONTROL

Mental illness healthcare and gun control regulations have consistently evolved throughout American history.[14] Indeed, psychiatric hospitalization procedures have transformed through increased understanding of mental illness, social justice movements, and Supreme Court jurisprudence attempting to preserve individual rights.[15] Gun control legislation was born out of times of crisis and has progressed in the face of public reaction to tragic events.[16] The colorful histories of these contentious, and often misunderstood, subjects illustrate both the missteps and the positive developments America has made in addressing mental illness and gun control.[17]

A. Involuntary Commitment

When an individual is subject to court-ordered psychiatric hospitalization against their will, it is known as involuntary civil commitment, or simply involuntary commitment.[18] Involuntary commitment invokes two main

9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part IV.
12. *See infra* Parts IV, V.
13. *See infra* Part V.
14. *See infra* Sections II.A, II.B.
15. *See infra* Section II.A.
16. *See infra* Section II.B.
17. *See infra* Sections II.A, II.B.
18. *See generally* Megan Testa & Sara G. West, *Civil Commitment in the United States*, PSYCHIATRY, Oct. 2010, at 30–38. When individuals voluntarily commit themselves, they may have the option to check out against medical advice if their state laws permit, whereas an individual

underlying legal principles: (1) the English common-law doctrine "parens patriae" or "parent of the country," which refers to assigning the government responsibility to intervene on behalf of citizens who cannot act in their own best interest, and (2) state police powers requiring a state to protect the interest of its citizens.[19] In the late nineteenth and early twentieth centuries, institutionalization in America drew no distinction between voluntary and involuntary admissions to psychiatric institutions, and the loose standards of civil commitment laws led to widespread abuse of commitment power.[20]

Importantly, the Supreme Court has acknowledged that, in addition to exposing individuals to potential due process violations, involuntary civil commitment is a deprivation of liberty partly because it creates "adverse social consequences": "Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual."[21] This stigma marks a long history of the misunderstanding and mistreatment of mentally ill or disabled individuals—and the accompanying violations of their constitutional rights.[22]

For instance, in 1925, the Supreme Court decided the case *Buck v. Bell*, in which Carrie Buck, an inmate at the Virginia Colony for Epileptics and Feebleminded, alleged a state law allowing for the involuntary sterilization of "mental defectives" violated her due process and equal protection rights.[23] Tragically, the Court disagreed with Ms. Buck, holding that Virginia's interest in avoiding "being swamped with incompetence" was sufficiently important to justify forced sterilization, and that neither Ms. Buck's due process rights nor her equal protection rights were violated.[24] Even worse, the determination

involuntarily committed cannot. *Hospitalization*, MENTAL HEALTH AMERICA, https://www.mhanational.org/hospitalization (last visited Feb. 9, 2022).

19. *See* Testa & West, *supra* note 18, at 31.

20. *See id.* at 32; Christyne E. Ferris, *The Search for Due Process in Civil Commitment Hearings: How Procedural Realities Have Altered Substantive Standards*, 61 VAND. L. REV 959, 963 (2008). Prior to the 1970s, in most states civil commitment merely required "findings" from two physicians that the patient was "ill and a proper subject for treatment in a psychiatric hospital," with no definition of "ill" or "proper subject." Ferris, *supra*. Patients often did not appear before a judge, and the majority of states "did not provide counsel to indigent respondents." *Id.* And when counsel was present, these hearings were "characterized by mutual expectations of perfunctory performance," rather than meaningful advocacy. *Id.* As a result of these nebulous standards and inadequate procedures, "hospitals became overcrowded with patients held on questionable grounds." *Id.*

21. Addington v. Texas, 441 U.S. 418, 425–26 (1979).

22. *See* Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1082 (2004).

23. *See* Buck v. Bell, 274 U.S. 200, 205 (1927).

24. *See id.* at 207. In reaching this decision, the Court applied rational basis review, the least

of Ms. Buck's "feeble-mindedness" was based on little more than the word of her foster parents and the fact that her mother was institutionalized as well.[25] Justice Oliver Wendell Holmes penned the Court's opinion, and the disdain in his tone as he addressed Ms. Buck's pleas for protection of both her body and her constitutional rights not only evinced the early-twentieth-century stigma that extends into today's society but also set precedent for nearly a century of mistreatment of the mentally ill.[26] Notably, this decision was made during the height of America's early-twentieth-century eugenics movement and resulted in the forced sterilization of as many as 70,000 individuals.[27]

Decades later, the Civil Rights Movement of the 1960s sparked mental-health-law reforms providing for more deinstitutionalization and patients' rights.[28] Many states imposed laws shifting commitment power from medical professionals to judges.[29] While this change decreased the number of unnecessary institutionalizations, it "put final commitment authority into the

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restrictive standard of scrutiny. *See id.*

25. *See id.* at 205–07; Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 30–31 (1985). Ms. Carrie Buck's mother, Emma, was incarcerated at the Virginia Colony and was considered a "disgraced" woman for allegedly having Carrie out of wedlock, despite records showing that Emma and Carrie's father were married when she gave birth to Carrie. *See* Lombardo, *supra*, at 52–53. Once committed, Emma was unable to care for Carrie, and Carrie lived with foster parents, Mr. and Mrs. J.T. Dobbs, for fourteen years before her incarceration at Virginia Colony. *See id.* at 53–54. Mrs. Dobbs's nephew raped Carrie when she was sixteen years old, impregnating her. *See id.* at 54. In a "desperate attempt to remove the embarrassment of a pregnant but unwed girl from their home" and "save the family reputation," the Dobbses suddenly began claiming that Carrie had shown "symptoms of feeblemindedness" since she was ten or eleven years old. *Id.* But Ms. Buck's school records show that she was not mentally deficient; in fact, her educators commented her work was "very good" and recommended she continue her education. *See id.* at 52. Shortly before incarceration, Carrie gave birth to her daughter, Vivian, who was deemed "not quite normal" at seven months old after a nurse observed her for a short period of time. *See id.* at 61. Yet, in school, Vivian made Honor Roll. *See id.* Relying on the scant and seemingly inaccurate information that had branded Emma Buck, Carrie Buck, and Vivian Buck as "degenerate," Justice Holmes sealed the fate of mental health stigma with his infamous remark that "[t]hree generations of imbeciles are enough," allowing the State of Virginia to cut Ms. Buck's fallopian tubes against her will. *Buck*, 274 U.S. at 207–08.

26. *See Buck*, 274 U.S. at 205–08. In addition to his infamous "[t]hree . . . imbeciles are enough" quote, Holmes commented that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." *Id.* at 207.

27. *See The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, NPR (Mar. 7, 2016, 1:22 PM), https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations#:~:text=In%201927%2C%20the%20U.S.%20Supreme,deemed%20to%20be%20%22feebleminded.%22.

28. *See* Ferris, *supra* note 20, at 964.

29. *See id.*

hands of legal professionals who often failed to understand the clinical aspects of mental illness."[30] Doctors later resumed a "more prominent role"[31] in involuntary commitment hearings, and the Supreme Court even acknowledged that "[w]hether [a person] is mentally ill . . . turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists."[32] While a step in the right direction, judges often blindly agree with expert witnesses,[33] and the Supreme Court noted that such hearings often amount to little more that "time-consuming procedural minuets before the admission."[34] Though the "supposed protections" of such proceedings "may well be more illusory than real," at the very least, the 1970s saw the law shift toward more patient-friendly standards.[35]

In fact, in 1975, involuntary commitment shifted from a "need for treatment" model to a "dangerousness" model, largely as a result of the Supreme Court's decision in *O'Connor v. Donaldson*.[36] There, the Court held

30. *Id.*

31. *Id.*

32. Addington v. Texas, 441 U.S. 418, 429 (1979) (emphasis omitted).

33. *See* Norman G. Poythress, Jr., *Mental Health Expert Testimony: Current Problems*, 5 J. PSYCHIATRY & L. 201, 213 (1977). A study found that judges tend to rubber stamp state expert witnesses' recommendations in civil commitment hearings, agreeing with their testimony between 79% and 100% of the time. *See id.* Judges frequently "downplay the role of respondents' attorneys by discouraging them from . . . questioning witnesses," so not only does the State have more resources to provide experts, these experts are not adequately cross-examined to ensure legitimacy and accuracy. Ferris, *supra* note 20, at 971. Even worse, there are "few controls on the discretion of doctors and judges," which has led to psychologists routinely misdiagnosing "perfectly sane people with serious mental illnesses." Samantha M. Caspar & Artem M. Joukov, *Worse than Punishment: How the Involuntary Commitment of Persons with Mental Illness Violates the United States Constitution*, 47 HASTINGS CONST. L.Q. 499, 501 (2020).

34. Parham v. J. R., 442 U.S. 584, 605 (1979).

35. *Id.* at 609.

36. *See* Testa & West, *supra* note 18, at 32–34; O'Connor v. Donaldson, 422 U.S. 563 (1975); *see also* Ferris, *supra* note 20, at 965 (explaining the shifts in involuntary treatment models). The "need for treatment" model allowed for involuntary commitment based solely on the fact that the individual was mentally ill, whereas the "dangerousness" model provides that to commit an individual, a state must prove one of the "generally advanced" justifications: "a risk of harm to self or others, the inability to care for oneself, or the need for treatment to cure a mental illness." Ferris, *supra* note 20, at 965. These justifications reveal that despite its namesake, dangerousness was likely only a sufficient, not necessary condition for involuntary commitment under this model, as "need for treatment" did not require dangerousness, and seemingly remained a sufficient justification. *Id.* But courts never conclusively established whether the need for treatment alone was an adequate basis for involuntary commitment under *O'Connor*, as the Supreme Court quickly collapsed the *O'Connor* standard in *Jones v. United States*. *See id.* In *Jones*, the Court declared that "the Due Process Clause *requires* the Government in a civil-commitment proceeding to demonstrate . . . that the individual is mentally ill and dangerous," effectively cementing dangerousness as a prerequisite to civil commitment. Jones v.

that a finding of mental illness alone was insufficient to justify continuous confinement; rather, "a [s]tate cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[37] Shortly after *O'Connor*, every state either modified civil commitment laws to incorporate the dangerousness component or reinterpreted existing statutes to include dangerousness.[38]

The Court's holding in *O'Connor* resulted from its application of strict scrutiny, which allows a state government to infringe on a fundamental right only if that infringement "is narrowly tailored to serve a compelling state interest."[39] Here, the fundamental right at stake was "every man's constitutional right to liberty."[40] And both state police powers to protect the welfare of society and parens patriae interests in protecting an individual who cannot protect themselves are considered compelling state interests.[41] Thus, the "dangerousness standard encompasses both of these justifications, invoking the police power rationale when the state commits an individual who is dangerous to others, and the parens patriae interest when the state commits an individual who is dangerous to himself."[42]

On the one hand, civil commitment is undoubtedly a necessary tool to aid "[o]ne who is suffering from a debilitating mental illness and [is] in need of treatment."[43] On the other, few recognize that those subject to civil commitment do not necessarily fit the stereotype of a "mental patient."[44] For instance, few recognize that voluntary commitment can rapidly evolve into

United States, 463 U.S. 354, 362 (1983) (emphasis added).

37. *O'Connor*, 422 U.S. at 576.

38. *See* PAUL S. APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE 28 (1994).

39. Reno v. Flores, 507 U.S. 292, 302 (1993); *O'Connor*, 422 U.S. at 573–76.

40. *O'Connor*, 422 U.S. at 573.

41. *See* Ferris, *supra* note 20, at 966. States' police powers and parens patriae interests "traditionally justify intrusive state action." *Id.* A seminal Supreme Court case establishing that protecting public welfare and individuals who cannot protect themselves are compelling state interests is *Jacobson v. Massachusetts*, where the Court held Massachusetts could mandate smallpox vaccinations and fine those refusing to get vaccinated. 197 U.S. 11, 12–39 (1905).

42. Ferris, *supra* note 20, at 966 (italics omitted).

43. Addington v. Texas, 441 U.S. 418, 429 (1979).

44. *See* Amir Garakani et al., *Voluntary Psychiatric Hospitalization and Patient-Driven Requests for Discharge: A Statutory Review and Analysis of Implications for the Capacity To Consent to Voluntary Hospitalization*, 22 HARV. REV. PSYCHIATRY 241, 241 (2014); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 683–84 (6th Cir. 2016).

involuntary commitment.[45] In fact, upon voluntary psychiatric admission, the "majority of states employ a [seventy-two]-hour period in which patients can be held following a request for discharge from hospitalization," and "after this evaluation period, either the patient must be discharged, or the facility must initiate involuntary commitment proceedings."[46] Thus, voluntary commitment can turn into involuntary commitment, imposing the legal status of court-ordered hospitalization on those who have sought treatment of their own accord.[47]

Further, many do not realize that someone who does not suffer from permanent mental illness, but rather temporary and understandable emotional distress, may be subject to involuntary civil commitment.[48] For example, in *Tyler v. Hillsdale County Sheriff's Department*, the plaintiff was emotionally devastated after his "wife of twenty-three years ran away with another man, depleted [his] finances, and then served him with divorce papers."[49] Never having seen their father so depressed, his teenage daughters contacted local police, and the plaintiff was briefly involuntarily committed for approximately two to four weeks to minimize any risk that he may become suicidal.[50] Subsequently, the plaintiff in *Tyler* never received any additional mental health treatment, successfully held a job for nearly twenty years before retiring, and remarried.[51] Medical professionals reported that the plaintiff showed "no signs of mental illness" and that his depression was nothing more than a "brief reacti[on]" to his divorce and its surrounding circumstances.[52] Nonetheless, the plaintiff is still subject to the restrictions, deprivations, and stigma that resulted from his involuntary commitment.[53]

One such restriction is the federal firearms ban challenged by the plaintiff in *Tyler*.[54] While the ban is unquestionably necessary to protect public safety, the federal government's failure to provide adequate procedures for obtaining relief from this ban illustrates the stigma surrounding mental illness in American society and the deprivation of individual rights—namely equal

45. *See* Garakani et al., *supra* note 44.
46. *Id.*
47. *See id.*
48. *See Tyler*, 837 F.3d at 683–84, 687–88.
49. *See id.* at 683.
50. *See id.*
51. *See id.* at 683–84.
52. *Id.* at 684.
53. *See id.*
54. *See id.*

protection and due process rights—that can occur as a result of state involuntary civil commitment procedures.[55] Further, it also illustrates American society's misunderstanding of mental illness and allows the National Rifle Association (NRA) to further capitalize on their campaign to use those receiving mental health care as scapegoats.[56]

In short, though the involuntary commitment system has made great strides since its inception, it is still not a perfect system, and its shortcomings have grave implications for the individual rights of those suffering from its inadequacies.[57]

B. Early Gun Control Efforts and Mental Illness: From the Federal Gun Control Act to the Brady Act

In the late 1960s, the federal government first addressed the need to reform gun control laws to regulate mentally ill persons' access to firearms.[58] Concurrent with the evolution of involuntary commitment, and following the assassinations of Martin Luther King Jr. and Robert F. Kennedy in April and June of 1968, respectively, President Lyndon B. Johnson sent letters to each state governor pressuring them to address gun control, stating:

> I urge you again to review your gun control laws and to speed work on the development of stringent legislation to assure that deadly weapons are kept out of the hands of the criminal, the demented, the alcoholic, and those too young to bear the terrible responsibility of owning weapons of

55. *See* Becki Goggins & Anne Gallegos, *State Progress in Record Reporting for Firearm-Related Background Checks: Mental Health Submissions*, NAT'L CTR. STATE CTS. 2–4 (Feb. 2016), https://www.ncjrs.gov/pdffiles1/bjs/grants/249793.pdf.

56. *See* Lexington, *Guns and the Mentally Ill: Why the NRA Keeps Talking About Mental Illness, Rather than Guns*, ECONOMIST (Mar. 13, 2013), https://www.economist.com/lexingtons-notebook/2013/03/13/why-the-nra-keeps-talking-about-mental-illness-rather-than-guns. The NRA "arguably wields far greater influence over national firearms policy than public opinion does" and has "laid the blame for mass shootings on untreated mental illness—rather than unregulated guns." Jeffrey W. Swanson, Elizabeth McGinty, Seena Fazel & Vickie Mays, *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANNALS EPIDEMIOLOGY 366, 366 (2015).

57. *See* Caspar & Joukov, *supra* note 33; *Tyler*, 837 F.3d at 683–84.

58. *See generally* Lyndon B. Johnson, *Letters to the Governors on the Need for Improving State Law Enforcement Systems and Gun Control Legislation*, AM. PRESIDENCY PROJECT (June 20, 1968), https://www.presidency.ucsb.edu/node/237043.

> destruction.[59]

A few months later, President Johnson signed the Gun Control Act of 1968, creating the first law preventing "mental incompetents" from purchasing firearms.[60] Amending Title 18 of the United States Code "to provide for better control of the interstate traffic in firearms,"[61] 18 U.S.C. § 922(g)(4) "Persons Adjudicated as a Mental Defective or Committed to a Mental Institution" reads:

> It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[62]

Section 922(g)(4) still stands today.[63] Further, federal regulations clarify that "[c]ommitted to a mental institution" refers to "a formal [involuntary] commitment" and that the prohibition does not apply to "a person in a mental

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59. *Id.*

60. *See* Olivia B. Waxman, *How the Gun Control Act of 1968 Changed America's Approach to Firearms—And What People Get Wrong About That History*, TIME, https://time.com/5429002/gun-control-act-history-1968/ (Oct. 30, 2018, 11:52 AM).

61. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1213 (1968). *See generally* 18 U.S.C. § 922(g)(4).

62. § 922(g)(4); *see also Federal Firearms Prohibition Under 18 U.S.C. § 922(g)(4): Persons Adjudicated as a Mental Defective or Committed to a Mental Institution*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/file/58791/download (May 2009) (defining "adjudicated as a mental defective"). Someone has been "adjudicated as a mental defective if a court, board, commission, or other lawful authority has made a determination that the person, as a result of marked subnormal intelligence, mental illness, incompetency, condition, or disease": (1) "[i]s a danger to himself or to others"; (2) "[l]acks the mental capacity to contract or manage his own affairs"; (3) "[i]s found insane by a court in a criminal case"; or (4) "[i]s found incompetent to stand trial, or not guilty by reason of lack of mental responsibility." *Federal Firearms Prohibition Under 18 U.S.C. § 922(g)(4): Persons Adjudicated as a Mental Defective or Committed to a Mental Institution*, *supra*.

> A person is "committed to a mental institution" if that person has been formally committed to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment: [t]o a mental institution involuntarily; [f]or mental defectiveness or mental illness; or [f]or other reasons, such as drug use.

Id.

63. *See* § 922(g)(4).

institution for observation or a voluntary admission to a mental institution."[64] Yet, Congress never defined the word "commitment," and to this day, various courts have adopted different approaches to its interpretation.[65]

For instance, courts unanimously agree that commitment must be involuntary to trigger the Gun Control Act but disagree as to whether "temporary involuntary hospitalization without a formal hearing satisfies the Act's commitment requirement."[66] Additionally, courts diverge on whether to defer to state legislatures' involuntary commitment statutes, with some courts carefully examining such statutes and some creating a "federal definition . . . that is not informed by the state's intent or word choice."[67] Finally, while courts agree that Congress intended to keep dangerous individuals from obtaining firearms, they disagree on whether Congress "only intended to prohibit gun possession by people whom a state had formally committed to a mental institution," or instead "broadly intended to prevent gun possession by anyone whom a state had placed involuntarily in a mental institution regardless of the patient's opportunity for a hearing or the purpose of the confinement."[68] These varying interpretations illustrate how ambiguous the language of § 922(g)(4) is and the need for Congress or the Supreme Court to clarify various aspects of the statute.[69]

Thirteen years after the passage of § 922(g)(4), the ability of the mentally ill to obtain firearms once again became a hot-button topic in the United States following the *Hinckley* verdict, where a jury found John Hinckley not guilty by reason of insanity after he attempted to assassinate President Ronald Reagan using a handgun.[70] Shortly after, the Supreme Court clarified

64. 27 C.F.R. § 478.11.

65. *See* Sohrab Zahedi, Robert Burchuk, David C. Stone & Alex Kopelowicz, *Gun Laws and the Involuntarily Committed: A California Road Map*, 37 J. AM. ACAD. PSYCHIATRY & L. 545, 547 (2009).

66. Clare Priest, *When a Stopgap Measure Triggers a Permanent Proscription: The Interpretation of "Committed to a Mental Institution" in the Gun Control Act of 1968*, 80 WASH. U. L.Q. 359, 360–61 (2002).

67. *See id.* at 361.

68. *Id.*

69. *See id.* at 360–61.

70. *See* Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 24 (2007). Hinckley was obsessed with Jodie Foster, an actress who starred in the movie *Taxi Driver*, where the protagonist plans to assassinate a presidential candidate. *See id.*; Natalie Jacewicz, *After Hinckley, States Tightened Use of the Insanity Plea*, NPR (July 28, 2016, 10:20 AM), https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea. Hinckley had repeatedly called and sent letters to Foster, and many believe

standards for commitment in *Jones v. United States*, announcing that "the Due Process Clause requires the Government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous."[71] The Court's cementing of a heightened bar for involuntary commitment marked both its reaction to public outcry[72] and its acknowledgement that individual rights—namely the right to due process of law—may be compromised by involuntary commitment.[73]

Over ten years later, the Brady Handgun Violence Prevention Act of 1993 was signed into law, influenced by the harm inflicted on President Reagan's White House Press Secretary, James Brady, who was shot in the head and suffered paralysis as a result of Hinckley's attempted assassination of Reagan.[74] The Act "required the U.S. Attorney General to establish the National Instant Criminal Background Check System (NICS)."[75] Federal Firearms Licensees must request background checks on those seeking firearms, and if the NICS index provides records showing an individual has been adjudicated as mentally defective or committed to a mental institution

his attempt to assassinate Reagan was a bid for the actress's attention. *See* Jacewicz, *supra*. Using this, and other evidence of Hinckley's mental health, Hinckley's defense attorneys successfully argued that he could not be held responsible for the assassination attempt because he was suffering from schizophrenia and a major depressive disorder when it occurred. *See id.*

71. Jones v. United States, 463 U.S. 354, 362 (1983).

72. *Id.* The public immediately reacted negatively to the *Hinckley* verdict, and the very next day "the Delaware legislature passed a law providing a Guilty But Mentally Ill verdict alternative in insanity cases." Valerie P. Hans & Dan Slater, *John Hinckley, Jr. and the Insanity Defense: The Public's Verdict*, 334 CORNELL L. FAC. PUB'NS 202, 202–03 (1983). Congress and other states quickly followed Delaware's lead, either abolishing the insanity defense altogether or creating stricter rules to govern it. *See* Jacewicz, *supra* note 70. While much of this public outcry stemmed from the public's disdain for Hinckley, it evinced a much larger issue—the public's misconception that the insanity defense was frequently, and successfully, used. *See id.* Tellingly, a 1981 study showed people believed that the insanity defense was raised in 43% percent of cases, when in reality, the defense was raised in less than 1% of cases, and over the study's two-year period, only resulted in a single acquittal. *See id.* Indeed, America's cumulative response to Hinckley's acquittal likely resulted largely from the inaccurate belief that achieving acquittal via the insanity defense was an easy task. *See id.* Raising the bar for the insanity defense appeased the public's misplaced concern and made it much harder for those suffering from mental illness to prove such a defense when genuinely applicable. *See id.*

73. *See generally* Addington v. Texas, 441 U.S. 418, 425–26 (1979) ("[O]nly one state by statute permits involuntary commitment by a mere preponderance of the evidence . . . , and Texas is the only state where a court has concluded that the preponderance-of-the-evidence standard satisfies due process.").

74. *See Brady Law*, BRITANNICA, https://www.britannica.com/topic/Brady-Law (last visited Feb. 11, 2022); The Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

75. *National Instant Criminal Background Check System (NICS)*, U.S. DEP'T JUST. (May 2015), https://ucr.fbi.gov/nics/general-information/nics-overview-brochure.

per § 922(g)(4), that individual cannot obtain a firearm.[76] While this program proved effective in lowering the number of mentally ill individuals who could legally access firearms, later, some glaring gaps in its efficacy came to light and sparked new reform.[77]

Though it is promising that the legislature has responded to public safety issues with much-needed gun control reform, the repeated need for reform illustrates that legislators must remain vigilant as society evolves and new firearm-related dangers arise.[78] Further, these reforms provide ample opportunity for the legislature to more effectively address public safety issues while simultaneously ensuring the statutory schemes for gun control are tailored to safeguard important individual rights.[79]

III. INDIVIDUAL RIGHTS AND RELIEF FROM DISABILITIES: WHERE WE STAND AND HOW WE GOT HERE

It is important to note that federal firearms bans are not necessarily a *complete* bar to obtaining a firearm.[80] Section 922(g)(4) and the statutory scheme for obtaining relief, however, have been challenged as unconstitutional since their inception and, despite their evolution, continue to face such challenges today.[81] An examination of the history of relief statutes, pre-*Heller* adjudication, *Heller* itself, and the § 922(g)(4) circuit split reveals the current state of individual rights as they relate to the federal firearms ban, and the path that got us here.[82]

A. The Failure of § 925(c) as a Road to Relief

Interestingly, prior to 1986, only "felons who ha[d] committed crimes not involving firearms [could] apply to the [ATF] for administrative relief from [the federal firearms ban]. No such relief [was] permitted for former mental

76. *See id.*

77. *See* NICS Improvement Amendments Act of 2007, Pub. L. No. 110–180, § 2(9), 121 Stat. 2559, 2560 (2008); *infra* Section III.C (discussing legislative reform addressing the shortcomings of NICS).

78. *See* Johnson, *supra* note 58; Waxman, *supra* note 60; NICS Improvement Amendments Act § 2(9).

79. *See* Lexington, *supra* note 56.

80. *See* 18 U.S.C. § 925(c); 34 U.S.C. § 40915.

81. *See* U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556, 558 (1986).

82. *See infra* Sections III.A, III.B, III.C.

patients."[83] In 1982, former mental patient, Anthony J. Galioto, brought an equal protection claim challenging the constitutionality of 18 U.S.C. § 925(c), the statute allowing felons to petition for relief.[84] The district court found that § 925(c)'s failure to include former mental patients violated equal protection principles because "[t]here is no rational basis for thus singling out mental patients for permanent disabled status, particularly as compared to convicts."[85] The district court further concluded that § 925(c) was unconstitutional because it "in effect create[d] an irrebuttable presumption that one who has been committed, no matter the circumstances, is forever mentally ill and dangerous."[86] The Supreme Court granted certiorari, and the case was argued on March 26, 1986.[87] Shortly after, on May 19, 1986, President Reagan signed the Firearms Owners' Protection Act into law, amending § 925(c) "by striking out the language limiting the provision to certain felons."[88] Then, on June 27, 1986, the Supreme Court issued an opinion declaring Galioto's equal protection claim moot and vacating the district court's judgment.[89]

The Firearms Owners' Protection Act's revision of § 925(c) "extended to persons who had been involuntarily committed to a mental institution" the ability to petition for relief from the federal firearms ban.[90] From 1986 to 1992, federal law provided this relief-from-disabilities program for felons *and* those adjudicated as mentally ill, with the amended § 925(c) stating:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by [f]ederal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's

83. *Galioto*, 477 U.S. at 558.

84. *See id.* at 558.

85. *Id.* at 559 (quoting Galioto v. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, 602 F. Supp. 682, 689 (D.N.J. 1985)).

86. *Id.* (quoting *Galioto*, 602 F. Supp. at 690).

87. *See id.*

88. *Id.*; *see* Firearms Owners' Protection Act, Pub. L. No. 99–308, § 105, 100 Stat. 449, 459 (1986).

89. *See Galioto*, 477 U.S. at 559–60.

90. Mai v. United States, 952 F.3d 1106, 1111 (9th Cir. 2020); *see* Firearms Owners' Protection Act § 105.

> record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice.[91]

In an effort to appropriately designate the authority to administer the relief-from-disabilities program, the director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) was placed in control of making such decisions.[92] But a mere six years later, Congress "prohibited the use of funds 'to investigate or act upon applications for relief from [f]ederal firearms disabilities under 18 U.S.C. § 925(c).'"[93] Congress justified defunding the program by arguing that reviewing applications was "a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made."[94]

91. 18 U.S.C. § 925(c). In other words, someone subject to the federal firearms ban could petition for relief, and the Attorney General would lift the ban if the petitioner provided sufficient evidence that their owning a firearm would not pose a danger to society. *See id.*

92. *See* 28 C.F.R. § 0.130(a)(1); 27 C.F.R. § 478.144(b).

93. *Mai*, 952 F.3d at 1111 (quoting United States v. Bean, 537 U.S. 71, 75 (2002)).

94. S. REP. NO. 102–353, at 19 (1992). Because § 922(g)(4) bans felons from owning firearms, § 925 requires the ATF to assess felons' petitions for relief from the federal firearms ban. *See* 18 U.S.C. §§ 922(g)(4), 925(c).

*B. Pre-*Heller *§ 922(g)(4) Adjudication*

While this Comment will clarify how *Heller* has served to complicate challenges to firearm prohibitions, it is important to note that other plaintiffs accused § 922(g)(4) of being unconstitutional prior to the Court's seminal Second Amendment decision.[95] In the 1971 case *United States v. Buffaloe*, the plaintiff challenged his conviction for violating § 922(g)(4)[96] by stating he had "never been adjudicated a mental defective or committed to a mental institution" in order to purchase two pistols.[97] Previously, the plaintiff, Buffaloe, had been found not guilty by reason of insanity under Virginia state law for maiming and was involuntarily committed as criminally insane.[98] Because he was discharged from the hospital sixteen months after commitment as "not . . . insane or feebleminded," Buffaloe argued to the Fourth Circuit that § 922(g)(4)'s application to him was unconstitutional.[99] The Fourth Circuit found this argument unconvincing and affirmed the district court's judgment, holding that the statute's application to Buffaloe was constitutional.[100]

Over a decade later, the Tenth Circuit heard *Redford v. U.S. Department of Treasury, Bureau of Alcohol, Tobacco and Firearms* in 1982.[101] The plaintiff, Redford, argued that the term "mentally incompetent" was "unconstitutionally vague" because it was undefined by federal statute and that the firearm ban's application to him was unconstitutional because he was allegedly no longer mentally incompetent.[102] Previously, in 1974, Redford was found not guilty by reason of insanity on an assault charge and committed to a state hospital until he was conditionally released a little over a year later and absolutely released about a year after that.[103] Later, in 1979, Redford was

95. *See* Zahedi et al., *supra* note 65.

96. *See* § 922(g)(4). At the time, what is now 18 U.S.C. § 922(g)(4) was included in 18 U.S.C. § 922(d)(4) but, here, is referred to by its modern code section for clarity. *See* § 922.

97. United States v. Buffaloe, 449 F.2d 779, 780 (4th Cir. 1971) (per curiam).

98. *See id.*

99. *See id.*

100. *See id.* Unfortunately, the Fourth Circuit's opinion fails to state which constitutional rights Buffaloe alleged the application of § 922(g)(4) violated. *See id.* Since the Supreme Court had yet to find there was a Second Amendment right to keep and bear arms, presumably Buffaloe brought his claims on other grounds—perhaps due process and equal protection. *See id.*; District of Columbia v. Heller, 554 U.S. 570 (2008).

101. Redford v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, 691 F.2d 471 (10th Cir. 1982).

102. *See id.* at 473.

103. *See id.* at 472.

arrested for harassing his housekeeper.[104] Though the charges were dismissed, the housekeeper revealed Redford possessed numerous weapons, and investigating officers seized Redford's eighteen firearms.[105] Subsequently, an ATF agent permanently seized the weapons pursuant to § 922(g)(4)'s[106] penalty provisions.[107] After Redford failed to timely file a claim for their return, the weapons were declared forfeited to the government, and Redford then filed his claim alleging § 922(g)(4) violated the Constitution.[108]

The Tenth Circuit found that the statute was not unconstitutional on vagueness grounds because someone "in Redford's position would reasonably understand that the statute applied to them."[109] The court further held that the prohibition's application to Redford was constitutional in the absence of express "exceptions for people who have regained their competency or sanity."[110] Thus, even in light of the Second Amendment's rapid evolution subsequent to these cases, both *Redford* and *Buffaloe* "serve as precedent case law in support of continued federal firearms prohibition," even when the individual has been adjudicated as sane after release.[111]

C. Heller *& the Circuit Split*

Briefly returning to the Brady Handgun Act for context, nearly fifteen years after its enactment, the failure to properly enforce the statute enabled the Virginia Tech shooter, who had "a proven history of mental illness,"[112] to "purchase firearms from [a Federal Firearms Licensee] because information

104. *See id.*

105. *See id.*

106. *See* 18 U.S.C. § 922(g)(4). At the time, 18 U.S.C. § 922(g)(4)'s penalty provisions were set forth in 18 U.S.C. § 924(d) and 18 U.S.C. App. § 1202(a)(3) but, here, are referred to as § 922(g)(4)'s penalty provisions for simplicity. *See* § 922(g)(4).

107. *See Redford*, 691 F.2d at 472–73.

108. *See id.* at 473.

109. *Id.*

110. *Id.* The court clarified that for purposes of the federal firearms ban, those who have been found not guilty by reason of insanity and subsequently hospitalized qualify as "adjudicated mentally incompetent." *Id.* Redford also asserted a Fifth Amendment takings claim, asserting that "the district court should have ordered the government to compensate him for the firearms it seized." *Id.* But the court disregarded this claim, noting "it has long been settled that if the government acts pursuant to a forfeiture statute, it may seize personal property without compensating the owner." *Id.*

111. Zahedi et al., *supra* note 65, at 547.

112. NICS Improvement Amendments Act of 2007, Pub. L. No. 110–180, § 2(9), 121 Stat. 2559, 2560 (2008). "Improved coordination between State and Federal authorities could have ensured that the shooter's disqualifying mental health information was available to NICS." *Id.*

about his prohibiting mental health history was not available to the NICS, and the system was therefore unable to deny the transfer of the firearms used in the shootings."[113] In the wake of this tragedy, Congress signed the NICS Improvement Amendments Act of 2007 (NIAA) into law in early 2008, "seek[ing] to address gaps in information available to NICS about such prohibiting mental health adjudications and commitments."[114] In an attempt to please all crowds, the NIAA included 34 U.S.C. § 40915.[115] Under § 40915, a state can grant citizens relief from the firearms ban if it has a state relief program that fulfills § 40915's requirements.[116] States are required to create these relief-from-disabilities programs in order to receive federal funds.[117] Notably, and likely not coincidentally,[118] the Supreme Court granted

113. *NICS Act Record Improvement Program*, BUREAU JUST. STATS. (Mar. 3, 2021), https://www.bjs.gov/index.cfm?ty=tp&tid=49.

114. *Id.*; *see* NICS Improvement Amendments Act of 2007 § 2.

115. *See* 34 U.S.C. § 40915.

116. *See* NICS Improvement Amendments Act of 2007 § 105(a), 121 Stat. at 2569–70.

117. *See* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 697 (6th Cir. 2016). Currently, around thirty states and one Native American tribe have such qualifying programs. *See State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2020*, *supra* note 5.

118. *See* Adam Liptak, *Carefully Plotted Course Propels Gun Case to Top*, N.Y. TIMES (Dec. 3, 2007), https://www.nytimes.com/2007/12/03/us/03bar.html. Robert Levy, a libertarian who interestingly has never owned a gun in his life, planned and personally financed the plaintiffs' position in *Heller*. *See id.* Levy is a constitutional scholar and modeled his plan after Thurgood Marshall's manufactured litigation that resulted in the Supreme Court overturning school segregation. *See id.* Levy, along with attorneys Alan Gura and Clark Neily, carefully vetted potential plaintiffs for their lawsuit, settling on a cast of six ideal individuals who are diverse in race, gender, sexual orientation, age, and economic status. *See* Paul Duggan, *Lawyer Who Wiped Out D.C. Ban Says It's About Liberties, Not Guns*, WASH. POST (Mar. 18, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/03/17/AR2007031701055.html. The suit was filed in 2003 and did not make it up to the Supreme Court until 2007. *See* Parker v. Dist. of Columbia, 311 F. Supp. 2d 103 (D.D.C. 2004). The Supreme Court receives approximately 10,000 petitions for writ of certiorari per year and follows the "Rule of Four," providing that if four Justices feel a case has value, they will issue a writ of certiorari, or a legal order for the lower court to send the case records to the Court for review. *See The U.S. Supreme Court*, JUD. LEARNING CTR., https://judiciallearningcenter.org/the-us-supreme-court/#:~:text=The%20Supreme%20Court%20receives%20about,issue%20a%20writ%20of%20certiorari.&text=When%20all%20is%20said%20and,75%2D85%20cases%20a%20year (last visited Feb. 11, 2022). The Court hears approximately seventy-five to eighty-five cases per year and often chooses "cases that will have a large constitutional impact, or that answer important legal questions that affect the whole nation." *Id.* Given the social unrest surrounding gun control in the months prior to the Court's granting certiorari, it follows that the Court saw *Heller* as an opportunity to address a hot-button area of the law riddled with unanswered questions. *See* District of Columbia v. Heller, 554 U.S. 570 (2008). What is more, given that the *Heller* majority consisted of the Court's conservative Justices Scalia, Thomas, and Alito, along with the two swing-vote (but often right-leaning) Justices Roberts and Kennedy, it is likely that the conservative bloc of the Court capitalized on the opportunity to redefine the Second Amendment as containing an individual right to own a firearm in somewhat of a retaliatory move in light of new gun control legislation. *See Heller*, 554 U.S. at 595.

certiorari to *District of Columbia v. Heller* in late 2007, issuing its opinion on the case on June 26, 2008, only a few months after the NIAA was signed into law.[119] Closely following NIAA's enactment, *Heller* marked a dramatic shift in Second Amendment jurisprudence.[120]

In *Heller*, the Supreme Court addressed whether the District of Columbia's prohibition on the possession of usable handguns in the home violates the Second Amendment, which required the Court to determine whether the Second Amendment creates an individual right to keep and bear arms.[121] In a majority opinion penned by Justice Scalia, the Court held that the Second Amendment *does* create an individual right to keep and bear arms, stating that "[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most [Americans] undoubtedly thought it even more important for self-defense and hunting" and that "the inherent right of self-defense has been central to the Second Amendment right."[122]

119. *See Heller*, 554 U.S. at 573.

120. *See id.* at 595.

121. *See id.* at 573. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

122. *Heller*, 554 U.S. at 599, 628. Both the plain text of the Second Amendment and its historical context indicate that preserving the militia was likely the only purpose of the Second Amendment. Zoom Interview with Barry McDonald, Professor of Law, Pepperdine Caruso School of Law (Mar. 3, 2021). Ironically enough, Justice Scalia was widely known as a textualist and originalist. *See* Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 185 (2017). Read as a whole, the text of the Second Amendment conveys a right for Americans to own guns to preserve state militias, and that Justice Scalia had to perform such linguistic gymnastics to achieve his desired outcome serves only to show that the plain text in its entirety works against Justice Scalia's desires. *See Heller*, 554 U.S. at 598–606; Zoom Interview with Barry McDonald, Professor of Law, Pepperdine Caruso School of Law (Mar. 3, 2021) (explaining the "accurate originalist and textualist interpretation of the Second Amendment"). Further, Justice Scalia also attempted to use originalism to mold the Second Amendment to his preferred outcome by imputing the assumption that "most [people] undoubtedly thought [the right to bear arms] even more important for self-defense and hunting" at the time of the Second Amendment's drafting, while completely avoiding any legitimate evidence of the Framers' intent. *Heller*, 554 U.S. at 599. James Madison cobbled together the Second Amendment using the text of state constitutions, and given that the Bill of Rights was intended to restrain the federal government's power, it is widely understood that the Second Amendment was meant to allow each state to preserve a militia in order to defend themselves from federal forces if need be. Zoom Interview with Barry McDonald, Professor of Law, Pepperdine Caruso School of Law (Mar. 3, 2021). *Heller* is an excellent illustration of the Court's unfortunate tendency to reverse-engineer its opinions by electing an outcome and then interpreting the law to achieve that end. *See id.* (discussing the intended outcome of *Heller*). Nonetheless, regardless of whether the Second Amendment actually does confer an individual right, if the Supreme Court insists it does, courts must be faithful to that interpretation and protect it to the same extent they protect other individual rights, though lower courts' unique

Attempting to modestly narrow the scope of the right, Justice Scalia's opinion specified that the Second Amendment protects the "right of law-abiding, responsible citizens to use arms in defense of hearth and home."[123] What is more, the Court clarified that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and that nothing in the *Heller* opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[124] The Court categorized these bans as "presumptively lawful," later clarifying that they are outside of the scope of the Second Amendment's protections and, thus, immune from Second Amendment claims.[125] One aspect of *Heller* that has drawn much criticism is its failure to address the full scope of the Second Amendment, including the standard of review for evaluating Second Amendment claims.[126] The majority acknowledged that its opinion left some issues unanswered, specifically pointing out that it intentionally "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions."[127]

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methodology regarding the Second Amendment will be discussed later. *See Heller*, 554 U.S. at 598–606.

123. *Heller*, 554 U.S. at 635.

124. *Id.* at 626–27.

125. *See id.* at 627 n.26; *see also* Beers v. Barr, 140 S. Ct. 2758 (2020) (remanding a claim that § 922(g)(4) is unconstitutional with instructions to dismiss the case as moot because, with respect to the facts at issue, the statute is "presumptively lawful" and, thus, outside the scope of Second Amendment protections).

126. *See Heller*, 554 U.S. at 636–37 (Stevens, J., dissenting).

127. *Id.* at 634 (majority opinion). Justice Scalia cleverly declined to classify Second Amendment rights as fundamental because then any laws infringing on the right to own a gun in the home would be subject to strict scrutiny. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding fundamental rights are subject to strict scrutiny); Reynolds v. Sims, 377 U.S. 533 (1964) (same). Strict scrutiny has been referred to as "strict in theory, but fatal in fact," because few laws pass the requirement that the government have a compelling interest for the law and that the law be the only way to achieve that interest. *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring). Thus, it follows that if the Court declared the right to own firearms a fundamental right, most laws regulating gun ownership would be struck down. *See id.* In *McDonald v. City of Chicago* only two years after *Heller*, the Court promoted the right to bear arms to a fundamental right and incorporated it to apply against the states through the liberty provision of the Fourteenth Amendment's Due Process Clause. 561 U.S. 742, 791 (2010). This only further ignited what has become an absolute dumpster fire of an area of the law, and lower courts have persistently refused to treat Second Amendment rights as they do other fundamental rights. *See* Sarah Herman Peck, *Post*-Heller *Second Amendment Jurisprudence*, CONG. RSCH. SERV. 1–2, https://fas.org/sgp/crs/misc/R44618.pdf (Mar. 25, 2019). In fact, the Sixth Circuit even remarked that the two-step approach to Second Amendment

The Court's opinion had a major impact on future Second Amendment cases because, prior to *Heller*, the majority of lower federal courts adhered to the "collective right theory," interpreting the Second Amendment as providing the states with a collective right to maintain militias.[128] After *Heller*, however, lower courts had to determine how to address Second Amendment claims given the Court's new "individual right theory" of the Second Amendment.[129] One clear point is that when a challenged regulation falls within the "presumptively lawful" category delineated in *Heller* (i.e., those addressing firearm possession by felons, the mentally ill, or general possession in sensitive areas), "a court does not need to apply a particular level of scrutiny in reviewing the restriction because the law does not facially violate the Second Amendment."[130] Thus, post-*Heller*, courts usually spend little to no energy on evaluating the constitutionality of such restrictions and often uphold them, so long as they are "longstanding prohibitions" or fall into one of the "presumptively lawful" categories the Court listed in *Heller*.[131]

Unsurprisingly, then, federal laws preventing those who have been adjudicated as mentally ill from obtaining firearms—namely § 922(g)(4)—fall into the "presumptively lawful" category.[132] This statute, however, is an "indefinite gun ownership prohibition"[133] and fails to address whether its restrictions apply to those who are no longer mentally ill; thus, there are limited options for those who are now in good mental health, do not pose a danger to society, and wish to legally obtain a firearm.[134] *Heller*'s establishment of an individual right to own a firearm has created a flood of

claims that many courts have adopted "bears an uncertain relationship" with *Heller*'s dictum. *See* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 689–90 (6th Cir. 2016).

128. *See* Peck, *supra* note 127, at 14.

129. *See id.* at 4.

130. *Id.* at summary. Otherwise, courts have generally applied a two-step framework to evaluate Second Amendment claims: First, courts ask whether the regulated person, firearm, or place comes within the scope of the Second Amendment's protections. *See id.* If it does, then courts ask "whether the challenged law burdens core Second Amendment conduct, like the ability to use a firearm for self-defense in the home," in order to determine what level of scrutiny to apply. *Id.* If Second Amendment activity is "substantially burden[ed]," courts apply strict scrutiny, otherwise—and most frequently—courts apply intermediate scrutiny. *See id.*

131. *See Heller*, 554 U.S. at 626, 627 n.26. In addition to the categories mentioned, the Court noted that "sensitive places" include schools and government buildings and that "laws imposing conditions and qualifications on the commercial sale of arms" are presumptively lawful as well. *Id.* at 626–27.

132. *See id.*

133. Zahedi et al., *supra* note 65, at 546. In contrast, states like California place a time-limited statutory firearm ban on those who have been involuntarily committed. *See id.* The individual may petition for relief from the ban five years after release. *See id.*

134. *See* 18 U.S.C. § 922(g)(4).

Second Amendment claims, and the circuits have split over those challenging the constitutionality of § 922(g)(4) as applied to fully recovered individuals.[135]

D. The Third Circuit: Binderup *and* Beers

In 2016, in *Binderup v. Attorney General United States of America*, the Third Circuit established a framework requiring challengers to federal firearm prohibitions to "(1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class."[136] The court further noted that "[t]here is no historical support for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights that were forfeited."[137]

Applying the *Binderup* framework in a later case, the Third Circuit rejected the plaintiff's claim in *Beers v. Attorney General United States*.[138] In 2005, plaintiff Beers was involuntarily committed for less than two months after disclosing suicidal ideations to his mother, who was "particularly concerned" because Beers owned a gun.[139] In 2013, seven years after Beers's release, a physician examining Beers stated that Beers was able "to safely handle firearms again without risk of harm to himself or others."[140] In analyzing Beers's subsequent claim that the federal firearms ban was unconstitutional as applied to him given his return to good mental health, the court first stated that § 922(g)(4) did not substantially burden any rights protected by the Second Amendment, so heightened scrutiny need not apply.[141] It then concluded that based on both the underlying policy reasons for § 922(g)(4) and the *Binderup* framework, Beers could only prevail if he

135. *See generally* Beers v. Att'y Gen. U.S., 927 F.3d 150, 158 (3d Cir. 2019) (analyzing a Second Amendment claim under the *Binderup* framework and intermediate scrutiny); Mai v. United States, 952 F.3d 1106, 1117 (9th Cir. 2020) (analyzing a Second Amendment claim under intermediate scrutiny only).

136. Binderup v. Att'y Gen. U.S. of Am., 836 F.3d 336, 347 (3d Cir. 2016) (citation omitted).

137. *Binderup*, 836 F.3d at 350.

138. *See Beers*, 927 F.3d at 159.

139. *See id.* at 152.

140. *Id.*

141. *See id.* at 157. In *Beers*, the Third Circuit noted that, in *United States v. Barton*, the court "determined that, even though felon dispossession statutes were presumptively lawful under *Heller*, § 922(g)(1) could still be challenged as it applied to individuals." *Id.* at 154–55; *see also* United States v. Barton, 633 F.3d 168, 173 (3d Cir. 2011), *overruled by Binderup*, 836 F.3d at 336.

could show "that he was never determined to be a danger to himself or to others."[142] Beers could not do so, and the Third Circuit affirmed the district court's decision to uphold the § 922(g)(4) firearms ban.[143]

Then on July 1, 2019, only eleven days after the Third Circuit issued its opinion in *Beers*, the "ATF released a 'Certification of Qualifying State Relief from Disabilities Program' . . . approving Pennsylvania's relief scheme."[144] Thus, Pennsylvania, Beers's state of residence, became one of approximately thirty states that has a state relief program fulfilling § 40915's requirements—meaning that Pennsylvania accepts federal funding and in exchange, has a program allowing it to grant its citizens relief from § 922(g)(4).[145] With the eradication of the federal relief-from-disabilities program under § 925(c), state programs like Pennsylvania's serve as the only route to relief from § 922(g)(4).[146] Consequently, in May of 2020, the Supreme Court granted certiorari, vacated the judgment, and remanded to the Third Circuit with instructions to dismiss the case as moot because Beers was "covered by this policy change and is now licensed to possess a firearm and has obtained one."[147]

Notably, the Third Circuit's opinion, though vacated, evinced an

142. *Beers*, 927 F.3d at 159.

143. *See id.*

144. Petition for Writ of Certiorari at 23, Beers v. Barr, 140 S. Ct. 2758 (2020) (No. 19-864); *see* Justin McShane, *Restoring Your Gun Rights in PA After a 302 Commitment*, PA. L. ABIDING GUN OWNER BLOG (2019), https://www.pennlago.com/restoring-your-gun-rights-in-pa-after-a-302-commitment/#:~:text=In%20a%20positive%20turn%20of,from%20Disabilities%20under%2018%20Pa.

145. *See State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2020*, *supra* note 5.

146. *See* S. REP. NO. 102–353, at 19 (1992); 34 U.S.C. § 40915.

147. *See* Petition for Writ of Certiorari, *supra* note 144, at 23; *Beers*, 140 S. Ct. at 2579. It is important to note that when the Supreme Court remanded this case with directions to dismiss the claim as moot, the opinion contained no reasoning. *See Beers*, 140 S. Ct. at 2579. This Comment interprets the failure to set forth any reasoning as holding Beers's claim was moot due to his obtaining a firearm because a central argument in his petition for writ of certiorari was that his doing so did not moot his claim under the voluntary cessation doctrine. *See* Petition for Writ of Certiorari, *supra* note 144, at 24–25. The fact that Beers was able to obtain relief from § 922(g)(4) illustrates the inadequacy of the Third Circuit's approach to assessing these claims, as they deemed him ineligible for relief while federal law deemed him eligible. *See* Beers v. Att'y Gen. U.S., 927 F.3d 150, 158 (3d Cir. 2019). This discord in standards could be addressed by legislative reform, or alternatively, circuit courts taking a uniform approach to assessing these claims. *See infra* Sections IV.B, IV.C. Interestingly, *Beers* is actually the second case where the mootness doctrine provided the Court the opportunity to dodge addressing the constitutionality of the federal firearms ban as applied to those adjudicated as mentally ill; *Galioto* was the first. *See Beers*, 140 S. Ct. at 2578–59; U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556, 558 (1986).

understanding of the social implications of § 922(g)(4)'s application, stating that "[n]othing in our opinion should be read as perpetuating the stigma surrounding mental illness. Although Beers may now be rehabilitated, we do not consider this fact in the context of the very circumscribed, historical inquiry we must conduct."[148] Interestingly, the Third Circuit noted that "Beers also asserted due process and equal protection violation[]" claims, which "were not raised on appeal."[149] Though the Third Circuit did not explicitly address the merits of Beers's due process and equal protection claims, it is possible that such claims were not raised on appeal because they were coextensive with Beers's Second Amendment claim.[150]

E. The Sixth Circuit: Tyler

In 2016, the Sixth Circuit followed the lower court trend of blatantly

148. *Beers*, 927 F.3d at 159.

149. *See id.* at 153 n.6.

150. *See id.* at 153. If these claims were not raised on appeal because they were considered coextensive with Beers's Second Amendment claim, this may conflict with the Ninth Circuit's dicta in *Mai*. *See* Mai v. United States, 952 F.3d 1106, 1113 (9th Cir. 2020). Under the Court's equal protection framework, one can assert an equal protection claim arguing discrimination as to the exercise of a fundamental right. *See generally* Reynolds v. Sims, 377 U.S. 533 (1964). Further, given that the Court has allowed plaintiffs to assert equal protection claims as to the exercise of rights deemed fundamental under the Court's substantive due process framework, it follows that equal protection claims can be asserted as to any fundamental right, including the Second Amendment right to own and bear arms. *See generally* Loving v. Virginia, 388 U.S. 1 (1967) (holding discrimination as to the exercise of a fundamental right violated equal protection principles); Skinner v. State of Oklahoma *ex rel* Williamson, 315 U.S. 789 (1942) (same). Generally, these equal protection claims warrant strict scrutiny, but given that the Second Amendment protects the right to bear arms, if the Supreme Court were to face an equal protection claim on the fundamental right to bear arms grounds, it would likely swat the equal protection claim aside and assess it as only a Second Amendment claim. *See* Reynolds v. Sims, 377 U.S. 533 (1964). Notably, individuals can also bring equal protection claims on the basis that they are being discriminated against due to the class they are part of. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960); Korematsu v. United States, 323 U.S. 214 (1944). This will be discussed in greater detail in Section IV.C. Furthermore, under the Court's procedural due process framework, when a plaintiff has a cognizable property interest grounded in positive law—here, the right to possess a firearm for self-defense in the home—the Court assesses the importance of the private interest affected, the adequacy of existing procedures in preventing erroneous deprivation, and the burden on the government of providing additional procedures. *See* Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976). Here, a procedural due process analysis may diverge from the normal routine because it could be argued that there is no cognizable property interest at issue, given that § 922(g)(4) falls within *Heller*'s "presumptively lawful" category. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008). The Court's recent reversal of *Beers* indicates this may be its current stance—that if the prohibition is presumptively lawful, there is no property right to be assessed at all. *See Beers*, 140 S. Ct. at 2758–59.

deviating from the Supreme Court's holding in *McDonald*[151] and applied intermediate scrutiny to the plaintiff's claim in *Tyler v. Hillsdale County Sheriff's Department*.[152] As previously discussed, Tyler was briefly involuntarily committed following an emotional divorce and showed no signs of mental illness in the years following his release.[153] The court in *Tyler* held that the federal government failed to show that there was a substantial relationship between § 922(g)(4) and the policy purposes of suicide prevention and crime reduction, and thus, the statute violated the plaintiff's Second Amendment rights.[154] In addressing *Heller*, the Sixth Circuit remarked that "*Heller*'s 'presumptively lawful' dictum"[155] did not foreclose constitutional scrutiny and that the Sixth Circuit was electing to follow the Seventh Circuit regarding the "presumptive lawfulness of longstanding bans [a]s precautionary, not conclusive."[156]

151. *See* McDonald v. City of Chicago, 561 U.S. 742, 767 (2010). As previously noted, in *McDonald v. City of Chicago*, the Supreme Court held the right to keep and bear arms is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition," thus, statutes restricting the core of the Second Amendment should be subject to strict scrutiny based on the Court's usual treatment of fundamental rights. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). But lower courts have shied away from applying strict scrutiny. *See* Peck, *supra* note 127. Lower courts' resistance seems to prompt the question: is it time for the nine unelected lawyers molding our laws to draw on the wisdom of circuit judges when it appears their decisions have not provided workable standards? *See id.*

152. *See* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 685 (6th Cir. 2016).

153. *See id.* at 684.

154. *See id.* at 691.

155. *Id.* at 686–87. The Sixth Circuit's characterization of the presumptively lawful category as "dictum" is seemingly inaccurate given *Heller*'s text and may contribute to the Supreme Court eventually granting certiorari to a Second Amendment case to clarify. *See Heller*, 554 U.S. at 627 n.26. Interestingly, Justice Clarence Thomas recently cited one of the *Tyler* concurrences in his dissent to a denial of a petition for writ of certiorari for a claim challenging the constitutionality of a New Jersey statute mandating an individual demonstrate "that he has a justifiable need to carry a handgun" to obtain a carry permit. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1865 (2020) (Thomas, J., dissenting). The concurrence Justice Thomas cited opined that the Sixth Circuit was straying from *Heller* and *McDonald* in applying heightened scrutiny and referenced "*Heller*'s discussion of 'longstanding prohibitions'" as law, rather than dictum. *See Tyler*, 837 F.3d at 702–03 (Batchelder, J., concurring). This indicates, unsurprisingly, that Justice Thomas and Justice Kavanaugh, who joined the part of Justice Thomas's dissent citing *Tyler*, think that the lower courts' approach to Second Amendment claims inappropriately deviates from precedent and that the presumptive lawfulness of "longstanding prohibitions" is, in fact, law. *See Rogers*, 140 S. Ct. at 1866. While this dissent may provide interesting insight into the personal opinions of individual Justices, it is important to note that dissents to denial of certiorari are dicta that may violate collective decisionmaking principles under Article III of the Constitution and tend to be more problematic than insightful—for a full discussion of the issues these dissents implicate, see Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 WAKE FOREST L. REV. 1021 (2021).

156. *Tyler*, 837 F.3d at 686–87; *see also* United States v. Williams, 616 F.3d 685, 692–94 (7th Cir.

The Sixth Circuit even commented that "[t]o rely solely on *Heller*'s presumption here would amount to a judicial endorsement of Congress's power to declare, 'Once mentally ill, always so.' This we will not do."[157] The court further remarked that "*Heller*'s presumption of lawfulness should not be used to enshrine a permanent stigma on anyone who has ever been committed to a mental institution for whatever reason."[158] While not all courts have adopted this sentiment, this recognition of the stigma surrounding mental illness—and the impact the judiciary can have on this stigma—is a step in the right direction.[159]

In contrast to *Beers*, however, on appeal, the plaintiff in Tyler argued more specifically that "given Michigan's lack of relief-from-disabilities program, § 922(g)(4) was unconstitutional as applied to him because it operated as an essentially permanent ban on his fundamental Second Amendment right to keep and bear arms."[160] Indeed, in August 2011, after his eligibility to purchase a firearm was denied, the plaintiff, Tyler, attempted to appeal the denial to the Federal Bureau of Investigation's NICS section.[161] The NICS section denied his appeal, however, explaining that under the NIAA, some states do have the ability to "pursue an ATF-approved relief of disability for individuals . . . who have been committed to a mental institution,' but that 'until Michigan has an ATF approved relief from disabilities program in place Tyler's federal firearm rights may not be restored.'"[162]

Based on this denial, Tyler also averred that § 922(g)(4)'s application to him "violate[d] the equal protection clause and that the government's failure to afford him notice and an opportunity to be heard on the matter violate[d] the Due Process [C]lauses of the Fifth and Fourteenth Amendments."[163] Tyler's equal protection and due process claims are somewhat germane to the § 922(g)(4) circuit split in light of the Ninth's Circuit's dictum in *Mai*, suggesting such equal protection and due process challenges might be

2010) (holding that the presumptively lawful status of longstanding bans on firearms is not conclusive).

157. *Tyler*, 837 F.3d at 688.

158. *Id.*

159. *See id.*; *supra* Part II.

160. *Tyler*, 837 F.3d at 684.

161. *See id.*

162. *Id.*

163. *Id.*

appropriate.[164] In *Tyler*, however, the Sixth Circuit did not address these claims because the parties "recognized and agreed that Tyler's claims under the Fifth and Fourteenth Amendments were coterminous with his Second Amendment claim."[165] Thus, "Tyler's Second Amendment claim [wa]s the only issue on appeal."[166] In its opinion, the Sixth Circuit cited the defunding of § 925(c) and Michigan's lack of a qualifying program as support for applying intermediate scrutiny.[167] Interestingly, the concurrence in *Tyler* cited *Buck v. Bell*, likening the government's advocacy for § 922(g)(4)'s lifetime application with Justice Holmes's attitude toward mental illness in the infamous 1927 decision.[168] In referencing *Buck v. Bell*, the concurrence commented that the assumption that one who has been committed will remain

164. *See id.*; Mai v. United States, 952 F.3d 1106, 1113 (9th Cir. 2020).

165. *Tyler*, 237 F.3d at 685. The district court opinion quoted the Supreme Court's statement that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims" to support its finding that Tyler's equal protection and due process claims were coextensive with his Second Amendment claim, although Tyler asserted a procedural due process claim, not a substantive due process claim. *See* Tyler v. Holder, No. 1:12-CV-523, 2013 WL 356851, at *6 (W.D. Mich. Jan. 29, 2013), *rev'd and remanded sub nom*. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 775 F.3d 308 (6th Cir. 2014), *reh'g en banc granted, opinion vacated* (Apr. 21, 2015), *on reh'g en banc*, 837 F.3d 678 (6th Cir. 2016), and *rev'd and remanded sub nom*. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016). Indeed, the district court cited the Sixth Circuit as specifically declining to consider claims that "conflate the enumerated Second Amendment right with Equal Protection and Due Process protections under the Fifth Amendment." *Id.* (quoting United States v. Carey, 602 F.3d 738, 741 n.2 (6th Cir. 2010)). The district court went on to note that the Ninth Circuit also "observed that 'although the right to keep and to bear arms for self-defense is a fundamental right, that right is more appropriately analyzed under the Second Amendment.'" *Id.* (quoting Nordyke v. King, 644 F.3d 776, 794 (9th Cir. 2011), *vacated by* 681 F.3d 1041 (9th Cir. 2012) (en banc)). But as discussed later, the Ninth Circuit more recently implied that equal protection and due process claims may be appropriate in the context of challenges to § 922(g)(4)'s application and § 40915's options for relief. *See Mai*, 952 F.3d at 1113.

166. *Tyler*, 837 F.3d at 685. Note that Tyler asserted equal protection and due process claims challenging the constitutionality of § 922(g)(4), the federal firearms ban, rather than § 40915, the relief from disability statute. *See id.* at 684–85. Given that the district court in *Galioto* found that § 925(c), the old relief statute, violated equal protection principles by including felons, but excluding those adjudicated as mentally ill from obtaining relief, it follows that asserting equal protection and due process claims against § 40915 could potentially avoid a finding that those claims are coterminous with a Second Amendment claim against § 922(g)(4). *See* U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556, 558 (1986). As discussed later, the Ninth Circuit's comments in *Mai* may support this contention. *See Mai*, 952 F.3d at 1113; *infra* Section IV.C.

167. *See Tyler*, 837 F.3d at 684–85. The opinion stated that because "there is no path available for Tyler to seek the restoration of his Second Amendment right," "some evidence of the continuing need to disarm those long ago adjudicated mentally ill is necessary to justify § 922(g)(4)'s means to its ends." *Id.* at 694.

168. *See id.* at 710 (Sutton, J., concurring).

"a risk to himself or others for the rest of his life . . . is a remarkable proposition."[169] The concurrence went on to state that "[i]t would be one thing if the government were making this argument in 1927. But it is not. No one today, I would have thought, thinks a prior institutionalization *necessarily* equals a present mental illness."[170]

F. The Ninth Circuit: Mai

While the parties in *Tyler* may have concluded that Tyler's due process and equal protection claims were "coextensive"[171] with his Second Amendment claims, in *Mai v. United States*, the Ninth Circuit indicated that this is not necessarily the case.[172] In *Mai*, plaintiff Mai argued that the continued application of § 922(g)(4) violated his Second Amendment rights because he had made many strides since his release from a nine-month involuntary commitment in 2000 and no longer suffered from mental illness.[173] As a teenager, a Washington state court determined Mai was "mentally ill *and* dangerous" and committed him "for mental health treatment after he threatened himself and others."[174] After his release at age eighteen, Mai obtained his GED, a bachelor's degree, a master's degree, obtained employment, fathered two children, and lived "a socially-responsible, well-balanced, and accomplished life."[175] In fact, Mai successfully petitioned a Washington state court for relief from Washington's state-law ban on his

169. *Id.*

170. *Id.* (citation omitted).

171. *Id.* at 688 (majority opinion).

172. *See* Mai v. United States, 952 F.3d 1106, 1113 (9th Cir. 2020). To be clear, the Ninth Circuit noted that the plaintiff did not bring equal protection and due process claims. *See id.* It is not certain whether the court was commenting that those claims could have been brought in conjunction with Mai's Second Amendment claim, indicating the three claims may not be coterminous, or that Mai could have successfully asserted those claims in lieu of the Second Amendment claim. *See id.* Additionally, it is worth noting that the Ninth Circuit's comments somewhat imply that if Mai had brought equal protection and due process claims, he could have challenged § 40915's constitutionality, rather than § 922(g)(4)'s. *See id.* But in *Tyler*, the plaintiff challenged § 922(g)(4)'s constitutionality with his equal protection and due process claims, so it is perhaps possible equal protection and due process claims could be brought against either statute. *See* Tyler v. Holder, No. 1:12-CV-523, 2013 WL 356851, at *6 (W.D. Mich. Jan. 29, 2013), *rev'd and remanded sub nom*. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 775 F.3d 308 (6th Cir. 2014), *reh'g en banc granted, opinion vacated* (Apr. 21, 2015), on *reh'g en banc*, 837 F.3d 678 (6th Cir. 2016), and *rev'd and remanded sub nom*. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016).

173. *See Mai*, 952 F.3d at 1117.

174. *Id.* at 1110 (emphasis added).

175. *Id.*

possession of firearms, and the court found that he "(1) is no longer required to participate in court-ordered inpatient or outpatient treatment; (2) has successfully managed the condition related to his commitment; (3) no longer presents a substantial danger to himself, or the public; and (4) the symptoms related to the commitment are not reasonably likely to recur."[176] This left only § 922(g)(4) in Mai's path to obtaining a firearm.[177]

In addressing Mai's Second Amendment claim, the court commented that on appeal, Mai did not "seek the application of the substantive standards defined in 34 U.S.C. § 40915" because he had "never asserted . . . an equal-protection claim that, because persons in thirty other states benefit from programs applying § 40915's substantive standards, he too is entitled to relief or to an opportunity to meet those standards," nor had he argued "that due process demands the same results."[178] Just like Michigan, Washington is another state that does not have a § 40915-compliant relief program.[179] The Ninth Circuit's comments, however, seem to cut against the *Tyler* district court's use of the Ninth Circuit's approach of analyzing the right to keep and to bear arms for self-defense under the Second Amendment as support for the district court's classification of equal protection and due process claims as coextensive with the Second Amendment claim.[180] When assessing Mai's Second Amendment claim, the Ninth Circuit took an analytical approach superior to that of its sister circuits.[181]

The Ninth Circuit applied intermediate scrutiny to Mai's claim, finding that the continued application of § 922(g)(4) did not violate Mai's Second Amendment rights.[182] In December of 2020, Mai filed a petition for certiorari.[183] Since the Court vacated and remanded *Beers v. Attorney General United States* in May of 2020 on mootness grounds, *Mai v. United States*

176. *Id.*

177. *See id.* at 1110–11.

178. *Id.* at 1113.

179. *See State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2020*, *supra* note 5.

180. *See Mai*, 952 F.3d at 1113; Tyler v. Holder, No. 1:12-CV-523, 2013 WL 356851, at *6 (W.D. Mich. Jan. 29, 2013), *rev'd and remanded sub nom*. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 775 F.3d 308 (6th Cir. 2014), *reh'g en banc granted, opinion vacated* (Apr. 21, 2015), *on reh'g en banc*, 837 F.3d 678 (6th Cir. 2016), and *rev'd and remanded sub nom*. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016) (citing Nordyke v. King, 644 F.3d 776, 794 (9th Cir. 2011), *vacated by* 681 F.3d 1041 (9th Cir. 2012) (en banc)).

181. *See Mai*, 952 F.3d at 1121.

182. *See id.*

183. *See* Petition for Writ of Certiorari, Mai v. United States, 141 S. Ct. 2566 (2021) (No. 20-819).

would have provided the Court a second chance to clarify an issue it previously could not, and given this circuit split, the Court would have been wise to provide lower courts with much-needed guidance.[184] Ultimately, however, the Court denied certiorari in April of 2021.[185]

In sum, the § 922(g)(4) circuit split consists of three approaches to the same issue.[186] The Third Circuit assesses Second Amendment claims challenging § 922(g)(4)'s constitutionality using its *Binderup* framework and has never found the statute to be unconstitutional.[187] The Sixth Circuit, on the other hand, found § 922(g)(4) was unconstitutional through its application of intermediate scrutiny.[188] Finally, the Ninth Circuit also applied intermediate scrutiny but found Congress's interests in public safety sufficiently justified § 922(g)(4) and affirmed its constitutionality.[189] These disjointed conclusions and analytical approaches emphasize that the uncertainty created by *Heller*, § 922(g)(4), and § 40915 jeopardizes important individual rights, and clarification is desperately needed.[190]

184. *See* Beers v. Barr, 140 S. Ct. 2758, 2759 (2020); *see also* Petition for Writ of Certiorari at 14–17, *Beers*, 140 S. Ct. 2758 (No. 19-864) (commenting that the Court must grant certiorari to a challenge to § 922(g)(4)'s constitutionality because the lower courts are "deeply fractured" about how to analyze these claims).

185. *See Mai*, 141 S. Ct. at 2566.

186. *See* Beers v. Att'y Gen. U.S., 927 F.3d 150, 158 (3d Cir. 2019); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 685 (6th Cir. 2016); *Mai*, 952 F.3d at 1121.

187. *See Beers*, 927 F.3d at 158.

188. *See Tyler*, 837 F.3d at 685.

189. *See Mai*, 952 F.3d at 1121.

190. *See Beers*, 927 F.3d at 158; *Tyler*, 837 F.3d at 685; *Mai*, 952 F.3d at 1121.

IV. BALANCING PUBLIC POLICY AND INDIVIDUAL RIGHTS: THE IMPORTANT INTERESTS AT ISSUE AND HOW WE CAN PROTECT THEM

Public safety and preserving the individual rights of those adjudicated as mentally ill are both of great importance, and there is a way to simultaneously and effectively serve these interests.[191] Examining the relationship between mental illness and gun violence reveals troubling narratives emerging in American society.[192] And providing appropriate procedures to all Americans can help remedy some of the misconceptions surrounding gun violence and refocus attention to gun control issues generally.[193] If such procedures cannot be established, courts assessing Second Amendment challenges to § 922(g)(4) should take the Ninth Circuit's approach, and plaintiffs should assert additional claims of unconstitutionality.[194]

A. Mental Illness, Violence & Public Safety

While current gun control measures have not completely eradicated gun violence, there is evidence that the NICS index has some efficacy in preventing firearm purchases.[195] For example, between 2009 and 2014, there was a 285% increase in the number of "federal denials to purchase firearms based on mental health records in the NICS [i]ndex," from 923 denials to 3,557 denials.[196] This is undoubtedly a positive step toward lowering gun violence in the United States, but it is also important to recognize the connection between mental illness and gun violence is not as strong as many believe it to be.[197] This misunderstanding has been caused, in part, by the NRA's perpetuation of the stigma around mentally ill individuals.[198]

A troubling cycle is emerging: a mass shooting occurs, the shooter is deemed mentally ill, and gun rights activists point the finger at mental illness and argue, "We [don't] go around shooting people, the sick people do."[199] The NRA has stated that it "backs the FBI-run instant background checks system used by gun dealers when selling firearms. . . . It supports putting all those

191. *See infra* Section IV.B.
192. *See* Swanson et al., *supra* note 56.
193. *See* Lexington, *supra* note 56; *infra* Section IV.B.
194. *See infra* Section IV.C.
195. *See* Goggins & Gallegos, *supra* note 55, at 13.
196. *Id.*
197. *See Mental Illness and Violence*, 27 HARV. MENTAL HEALTH LETTER 1–3 (2011).
198. *See* Lexington, *supra* note 56.
199. *Id.*

adjudicated mentally incompetent into the system, and deplores the fact that many states are still putting only a small number of records into the system."[200] But there is a hidden, blame-shifting agenda behind this support.[201] It is generally accepted that background check systems benefit public health, and it is necessary to safeguard society against allowing those who are mentally ill and dangerous from obtaining firearms.[202] The stigma surrounding mental illness and gun violence, however, is not necessarily supported by statistics,[203] and mental health experts fear the results of this mistaken association.[204]

In the wake of a rash of gun violence across the United States, mental health stakeholders encounter "a painful dilemma."[205] The "goal of keeping guns out of the hands of seriously mentally ill individuals" now stands as "perhaps the only piece of common ground between gun rights and gun control proponents."[206] In fact, after several mass shootings, public opinion polls have "found that a majority of Americans across the political spectrum favor[] 'increasing government spending to improve mental health screening and treatment as a strategy to prevent gun violence.'"[207]

An increase in mental health screening and treatment would be a welcome change, yet society cannot allow the focus on mental illness and gun violence to shift focus away from the issue of gun control generally.[208] Mental health

200. *Id.*

201. *See id.*

202. *See id.*

203. *See* Swanson et al., *supra* note 56; Jeffrey W. Swanson et al., *Preventing Gun Violence Involving People with Serious Mental Illness*, *in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 33–50 (Daniel W. Webster & Jon S. Vernick eds., 2013).

204. *See Mental Illness and Violence*, *supra* note 197. This article by no means asserts that there is no connection between mental illness and gun violence; rather, it asserts that the public's perception of this connection is inaccurate, and as a result, the stigma surrounding the issue is disproportionate. *Id.*

205. Swanson et al., *supra* note 56.

206. *Id.* at 366–67.

207. *Id.* at 367.

208. *See* Lexington, *supra* note 56; *The Latest: Trump Focuses on Mental Illness, Not Gun Control*, AP NEWS (Aug. 16, 2019), https://apnews.com/article/ee17d07cdda74eeabc7f6d572cb8e6f8. In 2019, shortly after two mass shootings in Ohio and Texas, President Donald Trump told supporters at a New Hampshire rally that to prevent mass gun violence, he wanted to reopen mental institutions across the country. *See The Latest: Trump Focuses on Mental Illness, Not Gun Control*, *supra*. Without offering any details on his proposal, he commented, "We will be taking mentally deranged and dangerous people off of the streets so we won't have to worry so much about them." *Id.* These comments illustrate the dilemma mental health experts face—mass shootings may provide a rare opportunity to build support for improving America's subpar mental healthcare system, but experts fear a widespread perception that "the mentally ill are dangerous" will result in depriving mentally ill individuals of their rights when statistics do not necessarily support the notion that mental illness is a

experts and consumer advocates strongly reject "what they s[ee] as the scapegoating of people with mental illnesses—the vast majority of whom, epidemiologic data shows, will never act violently toward others—as if people with mental health disorders were somehow responsible for gun violence in general."[209] Mental health experts and fieldworkers find themselves facing the "difficult prospect of debunking the public perception that 'the mentally ill are dangerous,'" while also "attempting to leverage that very perception to build support for (much-needed) public funding to improve the mental health care system in the United States."[210] And it is important "to achieve this goal without also spawning crisis-driven laws that might overreach in restricting the rights and invading the privacy of people with mental illnesses."[211]

The § 922(g)(4) circuit split illustrates the difficulties of balancing an individual's personal rights with the potential that their mental illness could lead to violence.[212] Further, the split illustrates one of the ways placing involuntary commitment into the hands of judicial officers and inefficient advocates[213] poses an issue—that it can lead to the lifelong deprivation of individual rights, which only furthers the stigmatization of those suffering from mental illness or brief emotional distress.[214] Both the legislature and courts must balance the concerns of perpetuating the stigma around the mentally ill with public policy.[215]

Because involuntary commitment is often related to suicidal tendencies, it is easy to argue that § 922(g)(4) indirectly invokes the parens patriae, or "parent of the country," doctrine—which assigns the government the

driving force behind increases in gun violence. *See* Swanson et al., *supra* note 56, at 367. Indeed, public health experts focused on firearms-related injury and mortality in the United States recommend a range of prevention policies to reduce gun violence. *See generally* Swanson et al., *supra* note 56. These policies include a ban on military-style assault weapons and high-capacity ammunition magazines, universal background checks for gun purchasers, and increased enforcement and penalties for individuals charged with illegal gun sales—solutions that encompass keeping guns out of the hands of mentally ill individuals, but do not focus on doing so as a primary means of reducing gun violence. *See generally id.* The broad reach of experts' proposed policies, rather than an emphasis on addressing mental illness specifically, is largely a result of the lack of statistical support for the proposition that mental illness is a predominant cause of gun violence. *See* Swanson et al., *supra* note 56, at 366–67.

209. Swanson et al., *supra* note 56, at 367.

210. *Id.*

211. *Id.*

212. *See* Beers v. Att'y Gen. U.S., 927 F.3d 150, 158 (3d Cir. 2019); Mai v. United States, 952 F.3d 1106, 1117 (9th Cir. 2020).

213. *See* Poythress, *supra* note 33, at 210. Few advocates contest their client's commitment, even when there are valid grounds to. *See id.* at 215.

214. *See* Swanson et al., *supra* note 56, at 367.

215. *See Mai*, 952 F.3d at 1117.

responsibility to intervene on behalf of citizens who cannot act in their own best interest—by preventing those with a heightened risk of suicidal tendencies from obtaining firearms.[216] In this respect, the Ninth Circuit appropriately deferred to the legislature in *Mai*, stating that "scientific evidence cited by the government shows an increased risk of violence for those who have been released from involuntary commitment."[217] The Ninth Circuit went on to immediately address the risk of suicide, noting:

> [A]uthors of one meta-analysis surveyed the available scientific literature that studied the relationship between a history of mental illness and the risk of suicide. The authors found that studies of persons released from involuntary commitment reported a combined "suicide risk [*thirty-nine*] *times* that expected." That extraordinarily increased risk of suicide clearly justifies the congressional judgment that those released from involuntary commitment pose an increased risk of suicide.[218]

This discussion raises one of the central questions underlying the claims of those who assert that § 922(g)(4) violates their individual rights: can someone who was once involuntarily committed as posing a risk of danger return to stable mental health?[219] As the plaintiff in *Mai* argued, "although suicide risk following release from commitment is extremely high, the risk 'seems highest' initially and 'diminishes thereafter.'"[220] The plaintiff in *Mai* was involuntarily committed for suicidal tendencies as a teenager, but in the twenty years since his commitment, he showed no signs of mental illness.[221]

214. *See* Priest, *supra* note 66, at 363–64 (discussing the parens patriae doctrine and its relation to involuntary commitment).

217. *Mai*, 952 F.3d at 1117.

218. *Id.* (citations omitted); *see also* Aaron J. Kivisto, *Gun Violence Following Inpatient Psychiatric Treatment: Offense Characteristics, Sources of Guns, and Number of Victims*, 68 PSYCHIATRY SERVS. 1025, 1030 (2017) ("Even though firearm legislation targeting individuals with mental illness showed little ability to reduce rates of firearm homicide, it is worth noting that this legislation might nonetheless meaningfully reduce rates of firearm suicide.").

219. *See* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 684 (6th Cir. 2016); *Mai*, 952 F.3d at 1108.

220. *Mai*, 952 F.3d at 1117.

221. *See id.* at 1110. As previously mentioned, since that involuntary commitment, he has obtained multiple degrees, successfully held employment, married, and raised two children. *See id.* Similarly, as also noted earlier, medical professionals in *Tyler* reported the plaintiff showed "no signs of mental illness" and that the decision to involuntarily commit the plaintiff resulted from his "brief reacti[on]" to the emotional circumstances he found himself in. *Tyler*, 837 F.3d at 684.

What's more, the Washington state firearm ban relief statute that qualified the plaintiff in *Mai* as mentally competent enough to own a firearm only deviates from federal disability relief statutes by a few words.[222] All of this prompts the question: what are appropriate legal standards for determining whether an individual has returned to good mental health such that they pose no danger to society?[223] Has a deprivation of rights occurred if an individual can qualify under one disability relief regulation, but cannot qualify under another that is very similar?[224]

The thrust of this Comment is not to propose that the legislature and the judiciary make efforts to lower the threshold for relief, or extend the ability to petition for relief with the sole purpose of making it easier to obtain firearms.[225] Rather, by noting the grave consequences of the Supreme Court's holding in *Buck v. Bell* and the stigma that surrounds mental illness in the United States, this Comment contends that our legislature and courts should do a better job of protecting the individual rights of those who have been adjudicated as mentally ill, given that the failure to do so can have dire results.[226] Specifically, where § 922(g)(4) applies, the inability to even petition for relief from disability deprives those who have been involuntarily committed of their due process and equal protection rights, and sometimes their Second Amendment rights as well.[227]

What is more, voluntary commitment can transform into involuntary commitment, which further illustrates the disturbing effect of this deprivation of constitutional rights; in effect, asking for help can lead to what is more or less a lifelong deprivation of three fundamental rights.[228] As a matter of public

222. *Compare* WASH. REV. CODE ANN. § 9.41.047(3)(c)(iii) (West 2020) (requiring a finding that "[t]he petitioner no longer presents a substantial danger to himself of herself, or the public"), *with* 34 U.S.C. § 40915(a)(2) (requiring a determination that the petitioner "will not be likely to act in a manner dangerous to public safety and that . . . relief would not be contrary to the public interest").

223. *See Mai*, 952 F.3d at 1112; Petition for Writ of Certiorari, *supra* note 183, at 21–25.

224. *See Mai*, 952 F.3d at 1112.

225. *See infra* Part V. While it is true that some who were previously unable to even petition for relief may be able to obtain firearms under the proposed legislative reform, this Comment advocates for keeping a high threshold for relief to balance individual rights and public safety—this will preserve the due process and equal protection rights of those adjudicated as mentally ill while only restoring their Second Amendment rights if they pose no threat to public safety. *See* 34 U.S.C. § 40915; *infra* Part V.

226. *See infra* Part V (arguing that the government should protect the individual rights of those with mental illnesses and avoid marginalizing them); Buck v. Bell, 274 U.S. 200, 207 (1927); *Tyler*, 837 F.3d at 710 (Sutton, J., concurring).

227. *See Mai*, 952 F.3d at 1110, 1115.

228. *See* Garakani et al., *supra* note 44.

policy, does society really want to punish and discourage seeking much-needed mental health treatment?[229] Is it not in the best interest of public health and safety to *encourage* seeking mental health treatment by ensuring that fundamental rights are preserved?[230] To avoid depriving Americans of their individual rights based on the stigma surrounding mental illness, Congress should provide a statutory route for those who have returned to good mental health to apply to own a firearm.[231] Further, if Congress fails to do so, courts should take the Ninth Circuit's approach in assessing claims challenging § 922(g)(4)'s constitutionality under the Second Amendment.[232]

B. Statutory Route to Relief

To assess how Congress can better safeguard the equal protection, due process, and Second Amendment rights of those adjudicated as mentally ill, it is necessary to further examine the previously mentioned NICS Improvement Amendments Act of 2007 (NIAA).[233] In seeking to "remedy weaknesses" in the NICS index,[234] "Congress authorized federal grants to encourage the states

229. *See id.*

230. *See* Swanson et al., *supra* note 56, at 374.

231. *See generally* Addington v. Texas, 441 U.S. 418, 425–426 (1979) (discussing how involuntary commitment can "engender adverse social consequences to the individual").

232. *See Mai*, 952 F.3d at 1115. As noted previously, though the Supreme Court has elevated the Second Amendment right to keep and bear arms to a fundamental right, applying strict scrutiny can lead to dangerous outcomes—which is why this Comment previously mentioned that lower courts are seemingly justified in their refusal to do so. *See* McDonald v. City of Chicago, 561 U.S. 742, 778 (2010); Peck, *supra* note 127. While this Comment begrudgingly admits that the legislature and the judiciary must acknowledge that the Supreme Court has found a "fundamental" individual right in the Second Amendment and must safeguard that right to an extent, by no means is it in the best interest of society to apply a "fatal in fact" level of scrutiny to gun control statutes, and in that sense, some deviation from the Supreme Court's unworkable standard is not unreasonable and has proved effective across lower courts. *See supra* note 126 and accompanying text.

233. *See* NICS Improvement Amendments Act of 2007, Pub. L. No. 110–80, § 103, 121 Stat. 2559, 2567 (2008).

234. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 682 (6th Cir. 2016); *see also* NICS Improvement Amendments Act of 2007 § 2(9). Congress found that Brady background checks were often delayed because the FBI did "not have automated access to complete information from the [s]tates concerning persons prohibited from possessing or receiving a firearm under [f]ederal or [s]tate law." NICS Improvement Amendments Act of 2007 § 2(3). "Nearly [twenty-one million] criminal records [were] [in]accessible by NICS, and millions of [accessible] criminal records [were] missing critical data"—these shortcomings were predominantly caused by "data backlogs." *Id.* § 2(4). Further, Congress commented that both the Virginia Tech school shooting (the "deadliest campus shooting in United States history" at that time), and a mass shooting at Our Lady of Peace Church in Lynbrook, New York, would have been prevented by Brady background checks if the NICS index were functioning as it was meant to. *See id.* §§ 2(8)–(9).

to supply accurate and up-to-date information to federal firearm databases."[235] Eligibility for the grants, however, is contingent "on the creation of a relief-from-disabilities program that allows individuals barred by § 922(g)(4) to apply to have their rights restored."[236] State programs must grant relief "if the circumstances regarding the disabilities . . . and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[237] In addition, "[t]he state program must also 'permit[] a person whose application . . . is denied to file a petition with the [s]tate court of appropriate jurisdiction for a de novo judicial review of the denial.'"[238]

The NIAA states that its purpose is to provide states with the funds to update records that are inaccessible due to "data backlogs" and to "automate[] access to information concerning persons prohibited from possessing or receiving a firearm because of mental illness, restraining orders, or misdemeanor convictions for domestic violence."[239] It is unclear why only approximately thirty states have elected to accept these federal grants.[240] But given that the NIAA specifies it seeks to improve the number of records the FBI can access through NICS background checks,[241] it follows that perhaps the twenty states not accepting grants either do not have record-keeping deficiencies, do not wish to share criminal and mental health records with the FBI, or do not want to form the prerequisite relief program to receive the grants.[242]

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235. *Tyler*, 837 F.3d at 682.

236. *Id.*

237. *Id.* (quoting NICS Improvement Amendments Act of 2007 § 105(a)(2)).

238. *Id.* at 683 (quoting NICS Improvement Amendments Act of 2007 § 105(a)(3)).

239. NICS Improvement Amendments Act of 2007 §§ 2(4), 2(5)(B).

240. *See State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2020*, *supra* note 5.

241. *See* NICS Improvement Amendments Act of 2007 § 2(3).

242. *See State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2020*, *supra* note 5. To receive such grants, states must "certify, to the satisfaction of the Attorney General, that the State has implemented a relief from disabilities program" in accordance with 34 U.S.C. § 40915. NCIS Improvement Amendments Act of 2007 § 103(c). States must allocate "[n]ot less than [three] percent, and no more than [ten] percent of each grant . . . to maintain the[ir] relief from disabilities program." *Id.* §§ 103(a)(1). It is unclear how expensive it is for states to institute these relief from disabilities programs, and the relatively small percentage of these grants allocated to maintaining such programs may be inadequate. *See id.* Further, as a condition of receiving a grant, a "[s]tate shall specify the projects for which grant amounts will be used, and shall use such amounts only as specified" to comply with the Act's requirements that states collect and supply criminal and mental health records in an electronic system providing "accurate and up-to-date information" for

At first glance, it seems as though the proposed solution should be to reinstate funding for § 925(c), which would allow individuals to petition directly to the ATF for relief.[243] This Comment, however, contends that Congress should first alter § 925(c) to ease the burdens that prompted defunding and then re-fund the program.[244] A proposed alteration that may ease Congress's concerns about the "very difficult and subjective task"[245] of determining whether to grant relief would be to allow citizens of the twenty no-grant states to either (a) petition to their state law firearms ban relief programs, and if relief is granted under state law, submit evidence of that relief to the ATF for assessment,[246] or (b) if the state does not have such a program, allow citizens to petition directly to the ATF.[247]

NICS background checks. *Id.* § 103(b)(1), 103(d).

243. *See* 18 U.S.C. § 925(c); S. REP. NO. 102–353, at 19 (1992).

244. *See* S. REP. NO. 102–353, at 19.

245. *Id.* As noted earlier, the difficulty of such a task, as well as the "devastating consequences for innocent citizens if the wrong decision is made," were Congress's purported reasons for defunding the federal relief program. *Id.*

246. *See, e.g.*, WASH. REV. CODE ANN. § 9.41.047 (West 2020). Washington, a state not accepting NIAA grants, has a program to petition for relief from state law firearm bans. *Id.*; *see, e.g.*, Zahedi et al., *supra* note 65, at 546 (noting that California also does not accept NIAA grants and allows individuals to petition for relief from state firearm bans). The ATF issues a "Certification of Qualifying State Relief from Disabilities Program" to states that have complied with the "minimum criteria" of § 40915. *Certification of Qualifying State Relief from Disabilities Program*, U.S. DEP'T JUST. BUREAU ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, https://www.atf.gov/file/11731/download (Mar. 2016). The minimum criteria checklist on this Certification includes the requirement that "[t]he petition for relief is considered by the lawful authority in accordance with principles of due process." *Id.* This requirement highlights the fact that having no qualifying relief from disabilities program is clearly a deprivation of due process. *See id.*

247. *See State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2020*, *supra* note 5. California, for instance, does not have a § 40915-compliant relief program. *See id.* Nonetheless, California provides that a person who has been involuntarily committed "shall not have in his or her possession or under his or her custody or control, or purchase or receive, or attempt to purchase or receive, any firearms whatsoever or any other deadly weapon for a period of five years" after commitment. CAL. WELF. & INST. CODE § 8100(b)(1) (West 2014). At the five-year mark, an individual may petition the California Superior Court and receive a hearing in which a district attorney represents the state as the respondent. *See id.* at § 8100(b)(2)(B)–(3)(A). The state has the burden to prove by a preponderance of the evidence that "the person would not be likely to use firearms in a safe and lawful manner." *Id.* § 8100(3)(B). This standard for relief is seemingly a lower threshold than § 40915 and would likely need to be heightened for the ATF to grant approval. *See generally id.* Interestingly, national gun-control advocates and experts view California's 5150 detainment, or involuntary commitment system, and its accompanying firearms as a model way for "mass shooters [to get help] before they open fire." Dan Freedman, *Gun-Control Advocates See 5150 Holds as Model*, SF GATE (Oct. 12, 2013), https://www.sfgate.com/crime/article/Gun-control-advocates-see-5150-holds-as-model-4891244.php. There are instances where individuals "lose their gun rights for nothing more than a brief emotional outburst," but in the cited examples, all individuals experiencing these outbursts "eventually regained their gun rights." *Id.* California may serve as an example where less

Another issue that arises with this proposal is that some state relief programs have lower standards for relief than § 40915, the current federal relief statute operating through programs established by state governments.[248] This is best exemplified by the Ninth Circuit's analysis in *Mai*.[249] There, the Washington law governing relief from the state-law prohibition on firearm possession required a determination that the person "no longer presents a *substantial danger* to himself or herself, or the public."[250] By contrast, § 40915 requires a finding that "the person will not be likely to act in a manner *dangerous* to public safety."[251] Further, § 40915 requires finding that granting "relief would not be contrary to the public interest," whereas the Washington law does not require any inquiry of this nature.[252] Thus, the Ninth Circuit concluded that, "the federal standard is more stringent than the Washington standard. Accordingly, unless Washington chooses in the future to create a program that meets the requirements of § 40915, [Mai] has no avenue for relief from § 922(g)(4)'s prohibition."[253] Indeed, the Ninth Circuit's comment implying that Mai may have a potential avenue for relief if Washington's state law were on par with § 40915's standards is promising.[254]

In particular, it is promising because states are only required to institute the § 40915-compliant programs in order to receive federal grants, so it follows that states may already have, or can institute, § 40915-compliant programs without accepting NIAA grants.[255] The Ninth Circuit's remark further shows that states can likely offer programs providing routes to relief from § 922(g)(4) without meeting NIAA record-improvement requirements,

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stringent firearm prohibitions are offset by a particularly efficient involuntary commitment system. *See id.* Nonetheless, the federal firearms ban must account for all states' involuntary commitments systems, and thus, maintaining the heightened standards for relief in § 40915 is necessary. *See* 34 U.S.C. § 40915.

248. *See* Mai v. United States, 952 F.3d 1106, 1112 (9th Cir. 2020).

249. *See id.*

250. *Id.* (quoting § 9.41.047(3)(c)(iii)).

251. 34 U.S.C. § 40915(a)(2) (emphasis added).

252. *Compare id.*, *with* § 9.41.047.

253. *Mai*, 952 F.3d at 1112. From a public policy perspective, though it may seem that the difference between § 40915's standards and Washington's relief standards are minor, given the public safety interests at issue it is very important to maintain a high standard for relief—and the Ninth Circuit appropriately deferred to Congress's judgment in refusing to find that Washington's standards did not warrant granting relief. *See id.* at 1112, 1121.

254. *See id.* at 1112, 1120.

255. *See* NICS Improvement Amendments Act of 2007, Pub. L. No. 110–80, § 2(9), 121 Stat. 2559, 2560 (2008).

which may be why some states do not accept such grants.[256] Such an option may be appealing for both states and the federal government—states can avoid submitting to NIAA requirements and in some cases improve their public safety by instituting more stringent relief standards than the existing state standards.[257] Concurrently, instituting an altered version of § 925(c) becomes more attractive to the federal government, as it takes a chunk of the decisionmaking and administration costs off of the ATF's shoulders and places it onto the states', as the ATF can simply reapprove petitions already granted by states that have § 40915-compliant programs.[258] The ATF would be responsible for approving state programs as § 40915-compliant and would otherwise be responsible for approving individual petitions for states failing to create such programs.[259]

Accordingly, this Comment offers a proposed amended version of § 925(c):

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by [f]ederal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. The Attorney General may grant such relief if it is established to his satisfaction that the applicant's disability, record, and reputation have been assessed by a [s]tate court,

256. *See Mai*, 952 F.3d at 1120; NCIS Improvement Amendments Act of 2007 § 2(9).

257. *See* NCIS Improvement Amendments Act of 2007 § 2(9).

258. *See id.*; *Mai*, 952 F.3d at 1112. The ATF could potentially use the aforementioned certification process it has in place to approve these programs in no-grant states but alter the certification checklist to omit the "Required Updates to State and Federal Records" criteria. *See Certification of Qualifying State Relief from Disabilities Program*, *supra* note 246.

259. *See* 18 U.S.C. § 925(c). Given that only approximately twenty states do not currently have § 40915-compliant programs through the NIAA, approving preexisting or newly instituted programs, or even reviewing individual petitions, would be significantly less burdensome than it was from 1986–1992, when § 925(c) was funded. *See id.*; *State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2020*, *supra* note 5.

> board, commission, or other lawful authority operating under a [s]tate relief from disabilities program implemented in accordance with 34 U.S.C. § 40915, and such an authority has found that the applicant's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.[260]

Enacting this amended statute and re-funding the ATF's relief program would provide a statutory road to relief that preserves individual rights, requires less federal funding and decisionmaking than the previous § 925(c) program did, and could potentially encourage states to increase their standards for obtaining relief, and thus improve public safety nationwide.[261]

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260. *See* § 925(c); 34 U.S.C. § 40915. The majority of § 925(c) stays intact, while the added provision reads:

> The Attorney General may grant such relief if it is established to his satisfaction that the applicant's disability, record, and reputation have been assessed by a [s]tate court, board, commission, or other lawful authority operating under a [s]tate relief from disabilities program implemented in accordance with 34 U.S.C. § 40915, and such an authority has found that the applicant's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.

See § 925(c); § 40915.

261. *See supra* Section IV.B.

C. Assessing Second Amendment Claims Challenging § 922(g)(4)'s Constitutionality: The Superior Approach

Alternatively, if no such statutory relief is provided and plaintiffs continue to litigate this matter, a Second Amendment claim is arguably the strongest claim of unconstitutionality to bring against § 922(g)(4).[262] Until the Supreme Court speaks on the matter, the Ninth Circuit's approach in *Mai* is the superior approach amongst the circuits who have faced this issue, and courts should follow the Ninth Circuit's reasoning.[263] In *Mai*, the court held that intermediate, rather than strict, scrutiny should apply to Mai's claim.[264] The Ninth Circuit then deferred to Congress in finding that § 922(g)(4) reasonably fits with Congress's "important goal of reducing gun violence," particularly suicide, and thus, it withstood intermediate scrutiny.[265]

This approach is superior to the Third Circuit's approach because the *Binderup* framework provides no clear guidelines for how a plaintiff may distinguish themself from a "historically barred class," and as such, courts' determinations on the matter are seemingly arbitrary, and the ability to prevail is seemingly illusory.[266] Finally, the Ninth Circuit's approach is superior to the Sixth Circuit's approach because, while statistics may not align with the public's beliefs about mental illness and gun violence, it is a stretch to hold, as the Sixth Circuit held in *Tyler*, that there is an inconsequential relationship between § 922(g)(4) and the policy purposes of suicide prevention and crime reduction.[267] Further, when it comes to firearms, it is undoubtedly in the best interest of public safety to defer to Congress's heightened standard for relief

262. *See* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016). The body of § 922(g)(4) case law shows a plaintiff can claim the statute is unconstitutional as applied to them specifically. *See, e.g.*, Redford v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, 691 F.2d 471, 473 (10th Cir. 1982) (assessing a claim that § 922(g)(4) is unconstitutional as applied to the plaintiff); *Tyler*, 837 F.3d at 699 (finding § 922(g)(4) is unconstitutional as applied to the plaintiff). Further, that the plaintiff in *Beers* could not distinguish himself from others subject to the ban supports the contention that these Second Amendment claims are individualized considerations. *See* Beers v. Att'y Gen. U.S., 927 F.3d 150, 159 (3d Cir. 2019). At the time, it had been only seven years since Beers was released from involuntary commitment. *See id.* at 152.

263. *See Mai*, 952 F.3d at 1110–21.

264. *See id.* at 1115.

265. *Id.* at 1121.

266. *See Beers*, 927 F.3d at 157.

267. *See Tyler*, 837 F.3d at 695. Further, given that the Sixth Circuit commented on Tyler's failure to obtain relief based on Michigan's lack of a § 40915-compliant program, it seems the Sixth Circuit may have been using a bit of results-oriented reasoning and dragging equal protection and due process issues into the spotlight, despite the parties' agreement that such claims were coterminous. *See id.* at 684.

from prohibitions on firearms.[268] The Ninth Circuit was mindful of this when holding that Washington's similar, but slightly less stringent, standards for relief were insufficient to show Mai should obtain relief without meeting § 40915's precise standards.[269]

The Ninth Circuit's approach also appropriately avoided furthering the stigma surrounding mental illness and gun violence by pointing to Mai's successes in life and stating, "We emphatically do not subscribe to the notion that 'once mentally ill, always so.'. . . [W]e have no reason to doubt[] that Plaintiff is no longer mentally ill."[270] The Ninth Circuit carefully framed its decision to emphasize that it was deferring to Congress's reasoning and broad public policy considerations, rather than basing its decision on the notion that Mai is permanently branded as mentally ill.[271] For these reasons, out of the three circuits that have addressed this issue, the Ninth Circuit has undoubtedly formulated the best approach to Second Amendment claims challenging § 922(g)(4).[272]

D. Asserting Equal Protection and Due Process Claims

Lastly, it is worth noting that plaintiffs asserting Second Amendment claims against the § 922(g)(4) federal firearms ban should assert equal protection and due process claims as well, or perhaps instead.[273] As a threshold matter, it may be better to bring equal protection and due process claims against the § 40915 federal relief statute, rather than § 922(g)(4).[274] First, the Ninth Circuit's comments in *Mai* implied that doing so would be appropriate.[275] Next, the district court in *Galioto* found that § 925(c) violated equal protection principles by allowing felons to petition for relief and excluding those adjudicated as mentally ill from doing so.[276] Because *Galioto*

268. *See Mai*, 952 F.3d at 1112.
269. *See id.*
270. *Id.* at 1110, 1121.
271. *See id.* at 1121.
272. *See id.* at 1110–21.
273. *See* Tyler v. Holder, No. 1:12-CV-523, 2013 WL 356851, at *6 (W.D. Mich. Jan. 29, 2013), *rev'd and remanded sub nom*. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 775 F.3d 308 (6th Cir. 2014), *reh'g en banc granted* (Apr. 21, 2015), on *reh'g en banc*, 837 F.3d 678 (6th Cir. 2016), and *rev'd and remanded sub nom*. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016); *Mai*, 952 F.3d at 1113.
274. *See Mai*, 952 F.3d at 1113.
275. *See id.*
276. *See* Galioto v. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, 602 F. Supp. 682,

was decided prior to *McDonald*'s holding that the Second Amendment creates a fundamental right to keep and bear arms, there was no discrimination as to the exercise of a fundamental right at issue, and this equal protection case was decided on the basis of class discrimination against those adjudicated as mentally ill.[277]

Though *Galioto* was vacated after § 925(c) was altered to include those adjudicated as mentally ill, this case shows that (a) federal courts have found individuals adjudicated as mentally ill to be a class, and (b) federal courts have found that this class warrant heightened scrutiny.[278] Indeed, the district court concluded that "persons with histories of mental illness are a quasi-suspect class deserving of intensified 'intermediate' scrutiny."[279] In doing so, the district court pointed to the fact that the Ninth Circuit had already "found former mental patients to be a 'quasi-suspect' class entitled to 'intermediate' scrutiny."[280] The Ninth Circuit remarked that "constitutional concerns are heightened by any classification scheme singling out former mental patients for differential treatment because of the possibility that the scheme will implement 'inaccurate and stereotypic fears' about former mental patients."[281] Though the Supreme Court has altered the equal protection framework since the Ninth Circuit decided this case and it is not certain that former mental patients would warrant intermediate scrutiny today, this precedent shows that courts are likely to find this class is entitled to some level of heightened scrutiny.[282] Moreover, given that the language of § 925(c) and § 40915 is

686 (D.N.J. 1985), *vacated sub nom*. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556 (1986).

277. *See Galioto*, 477 U.S. at 558–60; McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

278. *See Galioto*, 602 F. Supp. at 686.

279. *Id.* This case was decided only a few years before *City of Cleburne v. Cleburne Living Center*, the case from which the Supreme Court draws its test to slot new classes and determine what level of scrutiny the class warrants. 473 U.S. 432 (1985).

280. *Galioto*, 602 F. Supp. at 687 (citing J.W. v. City of Tacoma, 720 F.2d 1126 (9th Cir. 1983)).

281. *Id*. (citing *City of Tacoma*, 720 F.2d at 1130–31).

282. *See id.* at 685–87; *City of Cleburne*, 473 U.S. at 440–47 (creating a new class, nonsuspect but vulnerable, warranting meaningful rational basis scrutiny, which requires the government to show there is a legitimate reason for the law and the means was a reasonable way to achieve that end in order to pass constitutional muster). Professor Barry McDonald, expert on constitutional law and the Supreme Court, commented that it is unclear how asserting an equal protection claim based on class discrimination against those involuntarily committed would result. Zoom Interview with Barry McDonald, Professor of Law, Pepperdine Caruso School of Law (Mar. 3, 2021). He further commented that it is possible to do so, and with no precedent on the issue since prior to *City of Cleburne*, advocates would just have to make their best possible arguments for heightened scrutiny. *See id.* Asserting an equal protection claim based on discrimination against the exercise of a fundamental right to keep and bear arms, on the other hand, would likely be coterminous with the

nearly identical in terms of the standard for relief, *Galioto* shows that it may indeed be possible for a plaintiff to prevail on an equal protection claim challenging the constitutionality of § 40915.[283]

Asserting a due process claim, on the other hand, could prove to be a more difficult task.[284] As previously mentioned, to assert a procedural due process claim, one must first show they have a cognizable property or liberty interest grounded in positive law in whatever they are asserting the government has deprived them of without fair procedure.[285] While the right to keep and bear arms is undoubtedly both a property and a liberty interest grounded in the Second Amendment, the cognizable interest in asserting a due process claim against either § 922(g)(4) (as the plaintiff in *Tyler* did) or against § 40915, is the same; therefore, a court could potentially find either claim is coterminous with the Second Amendment.[286] With little to no precedent, predicting how courts might handle a procedural due process claim is a bit muddier than making equal protection predictions.[287] Nonetheless, the Ninth Circuit in *Mai* commented on the plaintiff's failure to bring both an equal protection claim and a due process claim, indicating the court may not find either to be coterminous with Second Amendment claims.[288]

Finally, a tactic to avoid having equal protection and due process claims declared coterminous with a Second Amendment claim could be to *only* bring equal protection and due process claims.[289] While courts can declare claims as coterminous, they cannot transform a claim under the Fifth or Fourteenth Amendment into a Second Amendment claim.[290] There is no way of knowing

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Second Amendment claims, and courts would probably ignore the equal protection claim and assess constitutionality under the Second Amendment. *See id.*

283. *See Galioto*, 602 F. Supp. at 685–87; *compare* 18 U.S.C. § 925(c), *with* 34 U.S.C. § 40915.

284. *See* Tyler v. Holder, No. 1:12-CV-523, 2013 WL 356851, at *6 (W.D. Mich. Jan. 29, 2013), *rev'd and remanded sub nom*. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 775 F.3d 308 (6th Cir. 2014), *reh'g en banc granted, opinion vacated* (Apr. 21, 2015), *on reh'g en banc*, 837 F.3d 678 (6th Cir. 2016), and *rev'd and remanded sub nom*. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016).

285. *See* Mathews v. Eldridge, 424 U.S. 319, 322–35 (1976); Bd. of Regents v. Roth, 408 U.S. 564, 569–72 (1972).

286. *See Tyler*, 2013 WL 356851, at *2, *6.

287. *See id.* at *6. Professor McDonald commented that procedural due process is a "totally different animal" from the Second Amendment, and that a plaintiff might be able to "get something out of a procedural due process claim" that they could not get from asserting a Second Amendment claim alone. Zoom Interview with Barry McDonald, Professor of Law, Pepperdine Caruso School of Law (Mar. 3, 2021).

288. *See* Mai v. United States, 952 F.3d 1106, 1113 (9th Cir. 2020).

289. *See id.*

290. *See id.*

how courts will assess equal protection and due process claims regarding § 40915; however, given that these frameworks are better established than the Second Amendment's framework, courts may more easily and more favorably assess these claims—particularly on equal protection class discrimination grounds.[291]

Though there is no binding precedent establishing an approach to assessing due process and equal protection challenges to § 922(g)(4) and § 40915, *Galioto* and the Ninth Circuit's dictum in *Mai* indicate such claims might be effective.[292] Plaintiffs challenging these statutes' constitutionality should undoubtedly highlight the various rights they jeopardize and assert equal protection and due process claims alongside Second Amendment claims, or alone.[293]

V. MOVING AWAY FROM MARGINALIZATION AND TOWARD PROTECTION

Ultimately, it is appropriate to return to *Buck v. Bell* to draw some parallels.[294] There, the Supreme Court found that Buck's due process, equal protection, and procreative rights[295] were not worthy of protection based on her status as mentally ill.[296] Buck's institutionalization was the product of an inadequate mental-health-care system,[297] and the Supreme Court's decision was the byproduct of the popularity of eugenics in the United States at the time.[298] Here, the involuntary commitment system is full of inadequacies that range from ineffective advocates and judicial officers[299] to "illusory" proceedings.[300] Moreover, courts have persistently acknowledged the American stigma surrounding both mental illness[301] and mental illness as it

291. *See* Galioto v. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, 602 F. Supp. 682, 686 (D.N.J. 1985), *vacated sub nom*. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556 (1986).

292. *See Galioto*, 602 F. Supp. at 686; *Mai*, 952 F.3d at 1113.

293. *See Mai*, 952 F.3d at 1113.

294. *See* Buck v. Bell, 274 U.S. 200 (1927); *supra* Section II.A.

295. *See Buck*, 274 U.S. at 207. The right to procreate was not recognized by the Supreme Court until much later in the 1942 case *Skinner v. Oklahoma ex. rel. Williamson*, so Buck's claims were limited to alleged due process and equal protection violations. *See id.*; Skinner v. Oklahoma *ex. rel.* Williamson, 316 U.S. 535 (1942).

296. *See Buck*, 274 U.S. at 207.

297. *See* Lombardo, *supra* note 25, at 34–35.

298. *See The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, *supra* note 27.

299. *See* Poythress, *supra* note 33.

300. Parham v. J. R., 442 U.S. 584, 609 (1979).

301. *See, e.g.*, Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 710 (6th Cir. 2016) (Sutton,

relates to firearms[302]—stigmas reinforced by widespread misperceptions and laws failing to protect the individual rights of the mentally ill.[303]

Roughly 70,000 Americans were sterilized as a result of the Court's decision in *Buck v. Bell*.[304] Indeed, "the instinct to 'demonize' people who are different is still prevalent in the [United States] today."[305] The goal of providing everyone with a means to petition for relief is not only to ensure that those adjudicated as mentally ill will have their equal protection, due process, and Second Amendment rights preserved—it is to cement the principle that this country protects the constitutional rights of all Americans, regardless of their perceived differences.[306] *Buck v. Bell* has shown us the grave consequences of failing to protect the rights of the institutionalized.[307] And today, as we see the perpetuation of the narrative that the connection between mental illness and violence justifies depriving those who have been involuntarily committed not only of their Second Amendment rights but of their equal protection and due process rights as well, we approach the slippery slope American society went down as a result of *Buck v. Bell*.[308]

If lawmakers can deprive the mentally ill of their equal protection and due process rights in this context, who is to say they will not do so in others?[309] Providing the option to petition for relief safeguards the equal protection and due process rights of a group that has historically been subject to stigma and similar deprivations and avoids setting the standard that needlessly marginalizing a group's rights is justified so long as a partial justification exists.[310] In light of these interests, this Comment proposes altering and re-funding § 925(c) to preserve the equal protection and due process rights of

J., concurring) (commenting on the stigma surrounding mental illness and the ways in which § 922(g)(4) perpetuates that stigma); J.W. v. City of Tacoma, 720 F.2d 1126, 1130–31 (9th Cir. 1983) (noting that violating former mental patients' equal protection rights furthers the stereotypic fears surrounding the class).

302. *See* Lexington, *supra* note 56.

303. *See* Swanson et al., *supra* note 56.

304. *See The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, *supra* note 27; *see generally* Buck v. Bell, 274 U.S. 200 (1927).

305. *The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, *supra* note 27.

306. *See supra* Part IV.

307. *See The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, *supra* note 27.

308. *See id.*

309. *See Buck*, 274 U.S. at 207; Lombardo, *supra* note 25.

310. *See supra* Part IV. While depriving those who have been involuntarily committed of their Second Amendment rights is justifiable in the interest of public safety, depriving this class of people of their equal protection and due process rights by failing to provide a route for relief is a failure to uphold the Constitution and only furthers the stigma surrounding mental illness. *See supra* Part IV.

those who have been adjudicated as mentally ill.[311] Alternatively, courts should adopt the Ninth Circuit's approach in assessing Second Amendment claims challenging § 922(g)(4).[312] Finally, plaintiffs seeking relief should consider challenging § 40915 on equal protection and due process grounds.[313] Striking an appropriate balance between public safety and the preservation of the constitutional rights of those who have been adjudicated as mentally ill is a difficult task that the legislature and the judiciary have struggled with throughout American history.[314] The § 922(g)(4) circuit split provides an opportunity to remedy an unconstitutional deprivation of rights, clarify unworkable Second Amendment standards, and extend a high threshold for firearms relief to further public safety.[315]

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311. *See supra* Section IV.B.
312. *See supra* Section IV.C.
313. *See supra* Section IV.D.
314. *See supra* Part IV.
315. *See supra* Sections IV.A–D.

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